

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

MERCHANTS TRANSFER & STORAGE COMPANY, a corporation,
SKINNER & EDDY CORPORATION, a corporation, LEWIS
L. STEDMAN, Liquidating Trustee of Skinner and Eddy Ship-
building Company, a dissolved corporation, and KING COUNTY,
WASHINGTON, a municipal corporation,

Appellees,

and

MERCHANTS TRANSFER & STORAGE COMPANY, a corporation,
SKINNER & EDDY CORPORATION, a corporation, and
LEWIS L. STEDMAN, Liquidating Trustee of Skinner and
Eddy Shipbuilding Company, a dissolved corporation,

Appellants,

vs.

UNITED STATES OF AMERICA and KING COUNTY, WASHING-
TON, a municipal corporation,

Appellees.

Transcript of Record

Upon Appeals from the District Court of the United States
for the Western District of Washington,
Northern Division

FILED

JAN 19 1944

No. 10573

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For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Special Assistant to
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Seattle, 1, Washington

MESSRS. RUMMENS & GRIFFIN,

Attorneys for Appellee Merchants Transfer &
Storage Co.,

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Seattle, 1, Washington

MR. LEWIS L. STEDMAN,

Attorney for Appellee Skinner & Eddy Corp.
and Lewis L. Stedman, Liquidating Trustee
of Skinner and Eddy Shipbuilding Co., a
dissolved corporation

1503 Hoge Building
Seattle, 1, Washington [1*]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision

No. 781

UNITED STATES OF AMERICA,

Petitioner,

v.

43,355 SQUARE FEET OF LAND, MORE OR
LESS, SITUATE IN KING COUNTY,
STATE OF WASHINGTON;

MERCHANTS TRANSFER & STORAGE COM-
PANY, a corporation; SKINNER & EDDY
CORPORATION, a corporation; LEWIS L.
STEDMAN, Liquidating Trustee of Skinner
and Eddy Shipbuilding Company, a dissolved
corporation;

KING COUNTY, WASHINGTON, a municipal
corporation;

UNKNOWN OWNERS, being all other persons or
parties unknown having or claiming any right,
title, estate, lien or interest in the real estate
described in the petition herein,

Respondents.

PETITION IN CONDEMNATION

Comes Now the petitioner, United States of
America, by its undersigned attorneys, at the direc-
tion and under the authority of the Attorney Gen-
eral of the United States, pursuant to a request of
the Acting Secretary of War, and represents;

I.

This action is instituted under the authority of the following Acts of Congress:

Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241), April 11, 1918 (40 Stat. 518; 50 U.S.C. sec. 171), and March 27, 1942 (Public Law 507—77th Congress), which acts authorize the acquisition of land for military or other war purposes, and the Act of Congress approved July 1, 1943 (Public Law 108—78th Congress.) [2]

II.

It is the opinion of the Acting Secretary of War and he has determined that it is necessary and advantageous to the Government to acquire for the United States by condemnation under judicial process for the storage of military supplies and other military purposes, an estate for a term of years in and to certain real property situate in the County of King, State of Washington, and more particularly described as follows:

Lot 4, Black's Replat of Portions of lots 18 and 19 of Block 368, Seattle Tide Lands, according to plat thereof recorded in Volume 11 of Plats, page 10, records of said county; Except the West 40 feet thereof; And

That portion of Lot 17, Block 368, Seattle Tide Lands, lying between the North production of the East line of said Lot 4 and a line parallel

to said produced line and 10 feet West thereof,
And

All of Lots 3, 5 and 6 and the West 40 feet of Lot 4, Black's Replat of Portions of Lots 18 and 19 of Block 368, Seattle Tide Lands, according to plat thereof recorded in Volume 11 of Plats, page 10, records of said county; And

That portion of Lot 17, Block 368, Seattle Tide Lands, lying between the East line of Lot 3 produced North, and the West line of Lot 6 produced North, Except the portion thereof lying between the West line of said Lot 3 produced North and a line parallel to said produced line and 10 feet West thereof; And

That portion, if any, of Lot 7 in said Black's Replat of Portions of Lots 18 and 19 of Block 368, Seattle Tide Lands, and of said Lot 17, Block 368, Seattle Tide Lands lying West of East line of Lot 7 produced North, and covered or occupied by a concrete building chiefly on Lots 5 and 6 of said Black's Replat.

All in King County, State of Washington, containing 43,355 square feet, more or less.

A map or plat of said real property is hereto attached, marked Exhibit "A" and made a part hereof.

III.

The estate to be acquired is a term of years ending June 30, 1944, extendible for yearly periods thereafter during the existing national emergency

at the election of the United States, [3] notice of which election shall be filed in the proceeding at least 30 days prior to the end of the term taken, or subsequent extensions thereof, together with the right to remove within a reasonable time after the expiration of the term or extensions thereof, any and all improvements and structures placed thereon by, or for, the United States, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines.

IV.

The persons and corporations ascertained to be interested in said land are named as respondents in the caption of this petition and made parties hereto. Petitioner also makes parties to this action all persons or parties unknown having or claiming any interest or estate in said land or any portion thereof and petitioner has designated such persons as "Unknown Owners, being all other persons or parties unknown having or claiming any right, title, estate, lien or interest in the real estate described in the petition herein."

V.

The utmost haste in expediting this project is vital to the successful prosecution of the war and the Acting Secretary of War has requested the Attorney General to secure an order of the Court directing the surrender of the possession of said property described above forthwith and granting to the United States the immediate right to occupy, use and improve said premises.

Wherefore, your petitioner prays this honorable Court:

1. That this condemnation be adjudged to be for the public use.

2. That the Court enter an order granting petitioner the immediate possession and right to occupy said property.

3. That compensation be paid for the appropriation of said estate in said property and that the parties entitled thereto [4] be ascertained and determined.

4. For such other and further relief as to the Court shall seem just and equitable.

F. P. KEENAN

Special Assistant to The At-
torney General

IVAN MERRICK

Special Attorney Department
of Justice

Office and Post Office Address:

655 Skinner Building

Seattle 1, Washington

State of Washington

County of King—ss

Ivan Merrick, being first duly sworn, on oath deposes and says: That he is a Special Attorney, Department of Justice, and one of the attorneys for petitioner. That he has read the foregoing petition, knows the contents thereof and believes the same to be true.

IVAN MERRICK

Subscribed and sworn to before me this 2nd day
of August, 1943.

(Seal)

H. I. KYLE

Notary Public in and for the State of Washington,
residing at Erumclaw.

[Endorsed]: Filed Aug. 2, 1943. [5]

TRACT MAP (WITHOUT GRID)

PD 601.53 MERCHANTS TRANSFER & STORAGE ~~WASHINGTON~~ *Where*

Project symbol No. 21 ~~W. Connecticut St., Seattle, Washington~~ Tract No. _____

Lewis L. Stedman, Liquidating trustee of Skinner & Eddy Shipbuilding Company,

Name of owner a dissolved corporation. Hoge Building, Seattle, ~~Washington~~

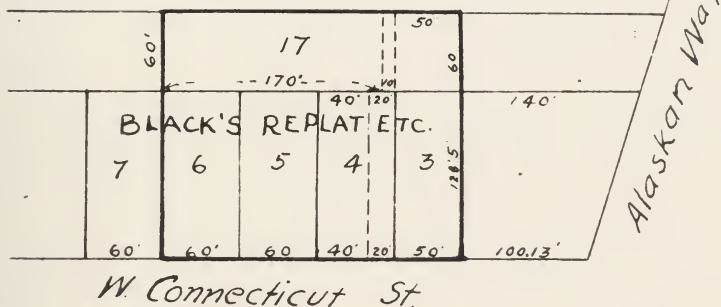
Field work by _____ Date _____

Description of tract _____

SCALE: 1" = 100'

368

SEATTLE TIDE LANDS.



CLASSES OF LAND

Crop land _____ ☐

Pasture land _____ ☐

Forest land _____ ☐

• _____ ☐

(The grades of each class of land must be shown on the map proper.)

* Name of any other class of land involved.

I certify that this is an accurate map of tract _____

_____ based on _____

_____ City Plat _____ which

shows this tract to contain _____ acres.

_____ Wilber L. Crook

_____ (Name)

_____ Draftsman.

_____ (Title)

_____ (Date)

Indicate whether map is based on General Land Office records, actual survey of tract, or deed to vendor from former owner, or indicate the nature of other information used.

[Title of District Court and Cause.]

MOTION TO DISMISS PURSUANT
TO RULE 12-B

The defendant, the Merchants Transfer & Storage Company, a corporation, moves the court to dismiss the action, because:

(1) The court does not have jurisdiction over the subject matter for the reason that the action is brought pursuant to a request of the Acting Secretary of War. The power delegated by the Act of March 27, 1942 (Public Laws 507, 77th Congress) does not grant the Acting Secretary of War authority to cause condemnation proceedings to be instituted.

(2) The complaint fails to state a claim against the defendant upon which relief can be granted in the following particulars: [7]

(a) The declaration of taking fails to show a legal authority under which the premises may be taken and the public use for which said lands are taken and further fails to state the specific allegations required pursuant to Title 40, Paragraph 258-a, U.S.C.A.

(b) Because the statement of the estate or interest in said lands which it is sought to take is not sufficiently described and set out. The interest is indefinite. It must be for one year but it may be for several years and beyond the term of the lease of this defendant. Each period of taking would be a separate matter and compensation would be fixed as of the date of each taking. The rights

in the property should be specified with certainty. 18 Am. Jur. 969, Para. 325.

(3) For the reason that the property and rights described in the property are already devoted to an essential war industry and public use under the laws of the State of Washington in relation to warehouses and also pursuant to the statement issued by the Office of the Defense Transportation of March 29, 1943, wherein it held in part that storage and warehousing were essential, particularly as it relates to the Nation's Food Supply. The petition fails to show that public necessities can be served by such taking. 18 Am. Jur. 723, Para. 97.

Wherefore Defendant Prays that the whole complaint be dismissed and for such further orders and relief as to the court may seem just.

ROY D. ROBINSON

TRACY E. GRIFFIN

Attorneys for defendant, Merchants Storage & Transfer Co.

[Endorsed]: Filed Aug. 4, 1943. [8]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

Rule 52-A

This cause coming on regularly for hearing before the court upon the petition of the United States

of America for the condemnation of certain property and for an order adjudging public use and granting an order for the immediate possession thereof pursuant to eminent domain statutes and the Second War Powers Act for the benefit of the Port of Embarkation; said cause having come on for hearing on the 2nd day of August 1943 and thereafter continued until August 7, 1943; the petitioner being represented by Ivan Merrick and Ernest T. Falk; and the respondent, Merchants Transfer & Storage Company, being represented by Roy D. Robinson and Tracy E. Griffin; and the respondent, Skinner & Eddy Corporation, being represented by Lewis L. Stedman; and testimony and documentary [27] evidence having been introduced on behalf of each of the parties and after argument of counsel, the cause having been submitted to the court and the court having rendered an oral decision herein makes and enters the following as its

FINDINGS OF FACT

I.

That the action was brought by the petitioner pursuant to the request of the Acting Secretary of War. That the respondents have raised a question that this being an action in eminent domain, the statutes must be strictly construed and as the statute does not recognize an Acting Secretary of War, that the petition does not give the court jurisdiction. The Court finds, however, that the Acting

Secretary of War under other statutes is given sufficient authority.

II.

The court further finds that the petition shows that the Acting Secretary of War has determined that it is necessary and advantageous for the Federal Government to condemn under judicial process for the storage of military supplies and for other military purposes an estate for years in said real estate in the petition described.

III.

The court further finds that under the authority of the *United States vs. the State of Montana*, 134 Fed. (2d) 194, the principle of rule or law has been adopted that when a Department of Government through its proper officials, such as the War Department, in good faith determines and finds necessary that the Government acquire by condemnation a certain piece of property owned by a citizen, that such determination is binding upon the court; in other words, the necessity for the taking of specific property and the right to determine what is a public use is in the first instance a legislative question for the Department rather than a judicial [28] question for the court, but the court further finds that where it is charged, as here, by attorneys for respondents, that the officers to whom has been delegated the authority of carrying out the purposes of Congress, has acted capriciously and arbitrarily, that it then becomes the duty of the

court to determine whether the taking is in good faith or is arbitrary and capricious.

IV.

The court further finds that the Government is seeking to take the right to the use of the property described in the petition for different specified terms as set out in Paragraph III of the petition.

V.

The court further finds that the property described in the petition is practically one acre of land lying on the north side of West Connecticut Street between Alaska Way and the water front; that it is improved with a four story frame building, with one-half basement containing over 90,000 square feet of floor space; that the upper floors have a load capacity of 125 pounds to a square *feet*. The building is heated. That it was constructed during the last War; that the respondent, Skinner & Eddy Corporation owns the fee.

VI.

The court further finds that the Merchants Transfer & Storage Company is a corporation organized under the laws of the State of Washington. That under the laws of the State of Washington it has a power of eminent domain. That it is authorized to do business as a public service warehouse; that its rights, powers and duties as such are controlled by the laws of the State of Washington. [29]

VII.

The court further finds that prior to February 4, 1941, the Merchants Transfer & Storage Company occupied a warehouse on Alaska Way about one block from the present location, which contained 65,000 square feet of floor space; that this warehouse, along with the Keystone Warehouse, were taken for the Port of Embarkation under eminent domain proceedings; that these properties were known as the Russell property.

VIII.

That on February 4, 1941, the Merchants Transfer & Storage Company leased the property in the petition described for a period of five years. That one-half of the term has already expired; that shortly after that date and at all times since, it has occupied said premises as a public warehouse, which is classed as an essential war industry. That the company is well equipped to handle the business and is capably managed. That in addition to its other business, it is bonded as a Customs' warehouse and at all times holds under bond a large amount of products for entry through the Customs. That the warehouse is filled to capacity and has approximately 10,500 tons of goods, wares and merchandise stored all of the time. That about 90% of the contents are food products. That a large amount of food products are received each day, usually in carload lots, and are disbursed through the warehouse to the various consumers; the average being 150 tons distributed each day. That the A. & P.

chain grocery stores are one of their large customers. The U. & I. Sugar Co. and various other large producers use the facilities afforded by this warehouse and are actively engaged in distributing food products and supplies to the civilian population and defense workers. That the Merchants Transfer & Storage Co. expended approximately \$12,500 in repairing the building and is reserving 10% of its space for the United States Government.

[30]

IX.

The court further finds that there is no other available space in the City of Seattle, which could be obtained by the Merchants Transfer & Storage Co. or by their larger customers for the distribution of these food products to the civilian population and that they will really suffer in their services of necessary supply if this property is withdrawn from such supply servicing to the public.

X.

The court further finds that subsequent to February 4, 1941, when the Merchants Transfer & Storage Co. acquired its present lease, that the U. S. Port of Embarkation, as shown by exhibits in the cause, has greatly extended its holdings so that it now owns or controls or in the process of obtaining all of the property entirely surrounding the property described in the petition, including practically all of the property between Alaska Way and the water front for a number of blocks and including a large number of warehouses such as

the A. M. Castle property, the Stacy Street Warehouse and the Goodrich warehouse, which is a building about 100 feet East of the property in the petition described and practically the same dimensions, the latter property being only partly occupied. That the U. S. Port of Embarkation has now practically completed a Pier at the end of West Connecticut Street, which is approximately 950 feet long and in excess of 150 feet in width with a large balcony, all of which will afford additional warehouse space.

XI.

The court further finds that a considerable portion of the Russell warehouse building heretofore mentioned and other properties have been converted from warehouse uses to office purposes. [31]

XII.

The court further finds that the United States desires immediate possession of the property at this time principally for the purpose of storing metal pipes, metal pipe fittings, metal ship repair parts and ships' stores. That the nature of the Government property to be stored upon said premises is not such as to indispensably require any particular space now, that it could be just as well cared for out in the open air with practically no depreciation, or under temporary sheds or canvas, and that while it may be convenient to have the space for storing pipes, it has other facilities which will answer its purpose and it has other warehouses

nearby and other space which has been converted to offices instead of warehouse and storage uses, the purpose for which it was acquired.

XIII.

The court further finds from the evidence, that so far as service to the civilian population is concerned, that there is not any other service which is comparable to the service from this warehouse and that this warehouse and storage service is practically indispensable to the public.

XIV.

The court further finds that the policy advanced by the Government for the policing and fire protection of its property is not necessary as the present municipal authorities rendered sufficient service of this kind.

XV.

The court further finds that the action of the United States in relation to obtaining immediate possession of this property has not been in good faith; that it has acted arbitrarily and capriciously and that the taking of immediate possession of this property is not a war time necessity. [32]

XVI.

The court further finds that the only matter now before the court is the application of the United States for immediate possession.

Done In Open Court this 13th day of August, 1943.

JOHN C. BOWEN

Judge

CONCLUSIONS OF LAW

From the foregoing findings of fact the court concludes as follows:

I.

That the motion of attorneys for respondents to dismiss the action for the reason it is brought at the request of the Acting Secretary of War should be denied.

II.

That while the right to determine what is a public use and when there is a public necessity for taking specific property by the Federal Government in the first instance are to be determined by the Department or person to whom the authority has been delegated by Congress, the question as to whether in carrying out the purpose of Congress, officers have acted capriciously and arbitrarily is a judicial question and the court has so considered it and does hereby conclude that the officers in this case have acted capriciously and arbitrarily and that the taking immediate possession of the property in the petition described is not necessary.

III.

That the application of the Respondents to dismiss the petition for condemnation is not properly

before the court and *and* should not be ruled upon at this time. [33]

IV.

That the application of the United States Government for the immediate possession of the property in the petition described should be denied.

Done In Open Court this 13th day of August, 1943.

JOHN C. BOWEN

Judge

Presented by:

ROY D. ROBINSON

LEWIS L. STEDMAN

TRACY E. GRIFFIN

Attorneys for Respondents

[Endorsed]: Filed Aug. 13, 1943. [34]

[Title of District Court and Cause.]

ORDER DENYING THE NECESSITY OF TAK-
ING AND THE RIGHT TO POSSESSION

This cause coming regularly on for hearing before the court on the 2nd day of August, 1943 and by the court continued to August 7, 1943, for an order authorizing the taking of the property in the petition described by condemnation, together with the right to the immediate possession thereof; the petitioner being represented by the Honorable Ivan Merrick and the Honorable Ernest T. Falk; and the respondents, Merchants Transfer & Storage

Company, being represented by Roy D. Robinson and Tracy E. Griffin; and Skinner & Eddy Corporation being represented by Lewis L. Stedman; and the said cause having heretofore been submitted to [35] the court and oral opinion having been rendered therein and findings of fact and conclusions of law having been heretofore made and entered in this cause and the law and the premises being by the court fully understood and considered.

It Is Hereby Ordered, Adjudged and Decreed that the motion for the entry of an order granting the petitioner the right to the immediate possession of said premises be and the same is hereby denied.

It Is Further Ordered, Adjudged and Decreed that the motion of the respondents to dismiss the petition for condemnation is not properly before the court and the court declines to rule upon this motion.

Petitioner excepts to the entry of this order and Respondents except to the refusal to dismiss the entire petition.

Each exception allowed.

Done In Open Court this 13th day of August, 1943.

JOHN C. BOWEN

Judge

Presented by:

/s/ ROY D. ROBINSON

/s/ LEWIS L. STEDMAN

/s/ TRACY E. GRIFFIN

Attorneys for Respondents

[Endorsed]: Filed Aug. 13, 1943. [36]

[Title of District Court and Cause.]

PETITION FOR RULE AND ATTACHMENT
IN RE: CONTEMPT

To the Judges of the District Court of the United States, for the Western District of Washington, Northern Division, Hon. John C. Bowen, Presiding:

Your petitioners respectfully show:

I.

On or about the 2nd day of August, 1943, the "United States of America, by its undersigned attorneys, at the direction and under the authority of the Attorney General of the United States, pursuant to a request of the Acting Secretary of War", filed in this court and cause its "Petition in Condemnation", seeking to condemn properties of petitioners, more particularly in said petition described.

II.

That paragraph V of said Petition did allege as follows:

"The utmost haste in expediting this project is vital to the successful prosecution of the war and the Acting Secretary of War [37] has requested the attorney General to secure an order of the Court directing the surrender of the possession of said property described above forthwith and granting to the United States the immediate right to occupy, use and improve said premises."

and in pursuance thereof the Petitioner did pray "that the Court enter an order granting petitioner the immediate possession and right to occupy said property."

III.

That, having elected to proceed in said matter in the above entitled court and cause, wherein and whereby said court became possessed of jurisdiction of the parties and of the subject matter, a hearing upon said petition was duly had, testimony taken, evidence adduced, with argument by respective counsel, and on the 13th day of August, 1943, the Honorable John C. Bowen, the duly qualified and acting Judge of the United States District Court for the Western District of Washington, Northern Division, before whom all said proceedings and hearing were had, did, in pursuance of Findings of Fact and Conclusions of Law, duly rendered, made and entered, duly render, make and enter an "Order Denying the Necessity of Taking and the Right to Possession"; that a copy of said order is hereunto attached, marked Exhibit "A", and by reference made a part hereof.

IV.

That paragraphs XV and XVI of the Court's Findings of Fact aforesaid were as follows:

"XV.

"The court further finds that the action of the United States in relation to obtaining immediate possession of this property has not been

in good faith; that it has acted arbitrarily and capriciously and that the taking of immediate possession of this property is not a war time necessity.”

“XVI.

“The court further finds that the only matter now before the Court is the application of the United States for immediate possession.”

V.

That no appeal was or has been taken from the Order and Judgment of this Court aforesaid.

VI.

That at about the hour of 5:50 P. M. on Wednesday, the 8th day of [38] September, 1943, the Petitioner, acting through Sherman B. Green, “Chief, Seattle Sub-Office” of the War Department, Office of Division Engineer, Pacific Division, Seattle Real Estate Field Office, 217 Lloyd Building Seattle, Washington, and through Major S. N. Tidemon, Jr., United States Army, and accompanied by the armed forces of the United States, seized the physical possession of the identical properties in the aforesaid Petition in Condemnation described, ousted the owners from possession thereof, posted notices of occupancy by the United States Army, and placed armed guards of the United States Army in and about said premises.

VII.

That the said Green delivered to petitioners, Merchant Transfer & Storage Company, a corpora-

tion, Skinner & Eddy Corporation, a corporation, and Lewis L. Stedman, Liquidating Trustee of Skinner and Eddy Shipbuilding Company, a dissolved corporation, a Notice of Taking Possession, copy of which is hereunto attached and marked Exhibit "B".

VIII.

That the Petitioner in said condemnation proceedings, acting through the War Department, as aforesaid, has taken, retained and is retaining the immediate possession of said premises hereinabove referred to and all in direct and open violation of the aforesaid order of this Court heretofore duly rendered, made and entered herein, and, notwithstanding the election of Petitioner in said condemnation, acting as aforesaid pursuant request of the Acting Secretary of War, has now, through the War Department, forcibly ousted the petitioners herein from their occupancy and use of said premises.

IX.

That the above named Sherman B. Green, Major S. N. Tidemon, Jr., U. S. Army, Honorable Robert P. Patterson, Under Secretary of War, Honorable Henry L. Stimson, Secretary of War, and (also directed against) all persons acting by, through or under them, or any of them, or in concert with them, or any of them, and all other officers, servants and persons acting in concert with or under their orders and direction, and each of them, had, have and at all times herein [39] mentioned had actual

notice of the rendering and entering of the order herein stated denying to the petitioner, United States of America, the right to the immediate possession of said premises, and each of them has wholly failed and neglected to observe and comply with the provisions and requirements of said order and have wrongfully and willfully refused so to do, and have wrongfully and unlawfully violated said order in the manner herein pleaded. That the refusal of the above named persons to obey said order of the court and their forcible and willful taking possession of said premises, as herein pleaded was and is calculated and intended by them, and each of them, to and actually did defeat, impede and impair the order of the court herein pleaded and did and does prejudice the rights and remedies of the respondents in said action, who are the petitioners herein, to the great and irreparable injury and damages to your petitioners herein. That the undersigned, who verify this petition, are duly authorized by the respective corporate entities the respondents above named, who are petitioners herein, to make this application and to take these proceedings for and on their behalf.

X.

That the agents and officers of the original Petitioner in Condemnation, to-wit: Sherman B. Green, Major S. N. Tidemon, Jr., and Honorable Robert P. Patterson, Under Secretary of War but designated in this proceeding as "Acting Secretary of

War", and Honorable Henry L. Stimson, Secretary of War, and all persons acting by, through or under them, or any of them, or under their orders and directions, are in contempt of this court for the willful and deliberate violation of a lawful order, decree and command of this Court herein pleaded.

This Petition is also based on the affidavits of Samuel C. Horner, and Lewis L. Stedman, verified September 10th, 1943, which are attached hereto and made a part of.

Wherefore, your petitioners pray that a Rule and Attachment issue for contempt of each said Green, Tidemon, Patterson and Stimson, and that under the usual process and rules of this Court they be punished accordingly, and that the [40] possession and use of said premises be forthwith restored to petitioners herein.

Dated this 11th day of September, 1943.

MERCHANTS TRANSFER &
STORAGE COMPANY

By SAMUEL C. HORNER

Secretary

SKINNER & EDDY CORPORA-
TION

By LEWIS L. STEDMAN

Secretary

LEWIS L. STEDMAN

Liquidating Trustee of Skin-
ner and Eddy Shipbuilding
Company, a dissolved corpo-
ration.

State of Washington,
County of King,—ss

Samuel C. Horner, being first duly sworn, on oath, deposes and says:

That he is the Secretary of Merchants Transfer & Storage Company, a corporation, one of the petitioners above named; that he makes this verification for and on behalf of said corporation and is authorized so to do; that he has read the foregoing Petition for Rule and Attachment in Re: Contempt, knows the contents thereof and believes the same to be true.

SAMUEL C. HORNER

Subscribed and sworn to before me this 11th day of September, 1943.

(Seal)

J. L. CORRIGAN

Notary Public in and for the State of Washington,
residing at Seattle.

ROY D. ROBINSON and
RUMMENS & GRIFFIN

Attorneys for Merchants Transfer & Storage Company

LEWIS L. STEDMAN,

Attorney for Skinner & Eddy Corporation
and per se. [41]

EXHIBIT "A"

[Printer's Note: Exhibit "A" is not reproduced here as it is identical with "Order Denying the Necessity of Taking and the Right to Possession", which is set out beginning at page 21 of this printed record.]

EXHIBIT "B"

War Department
Office of Division Engineer
Pacific Division
Seattle Real Estate Sub-Office
217 Lloyd Building
Seattle, 1, Washington

8 September 1943

Refer to File No. FD 601.53 (1) Seattle, Wn.
Merchants Transfer and Storage Company

NOTICE OF TAKING OF IMMEDIATE POS-
SESSION BY THE UNITED STATES OF
AMERICA

To: Merchants Transfer and Storage Company
24 West Connecticut Street,
Seattle, Washington.

This is to notify you that on the 2nd day of August, 1943, there was filed in the United States District Court, in and for the Western District of Washington, Northern Division, a petition for condemnation under the Second War Powers Act, entitled United States of America vs. 43,355 square feet of land, more or less, situate in King County, State of Washington; Merchants Transfer & Storage Co., et al, Case No. 781, condemning the right to immediate possession of the following described property, to-wit:

Lot 4, Black's Replat of Portions of Lots 18
and 19 of Block 368, Seattle Tide Lands, ac-

ording to plat thereof recorded in Volume 11 of Plats, page 10, records of said county; Except the West 40 feet thereof; And

That portion of Lot 17, Block 368, Seattle Tide Lands, lying between the North production of the East line of said Lot 4 and a line parallel to said produced line and 10 feet West thereof, And

All of Lots 3, 5 and 6 and the West 40 feet of Lot 4, Black's Replat of Portions of Lots 18 and 19 of Block 368, Seattle Tide Lands, according to plat thereof recorded in Volume 11 of Plats, page 10, records of said county; And

That portion of Lot 17, Block 368, Seattle Tide Lands, lying between the East line of Lot 3, produced North, and the West line of said Lot 6 produced North Except the portion thereof lying between the West line of said Lot 3 produced North and a line parallel to said produced line and 10 feet West thereof; And

That portion, if any, of Lot 7 in said Black's Replat of Portions of Lots 18 and 19 of Block 368, Seattle Tide Lands and of said Lot 17, Block 368, Seattle Tide Lands lying West of East line of Lot 7 produced North, and covered or occupied by a concrete building chiefly on Lots 5 and 6 of said Black's Replat.

All in King County, State of Washington, containing 43,355 square feet, more or less. [44]

This is to notify you that the United States of America is taking immediate possession of said premises for the term or terms condemned in the aforementioned petition under authority of the Act of Congress approved March 27, 1942 (Public Law 507 77th Congress), wherein is granted authority to the Secretary of War to take immediate possession of said premises and the Secretary of War having delegated this authority to the Division Engineer through the Chief of Engineers.

For the Division Engineer:

(Sgd.) SHERMAN B. GREEN

Chief, Seattle Sub-Office

Date_____

Receipt is hereby acknowledged of the above notice:

MERCHANTS TRANSFER AND STORAGE
COMPANY

By_____ [45]

[Title of District Court and Cause.]

AFFIDAVIT OF LEWIS L. STEDMAN IN
SUPPORT OF PETITION TO PUNISH
FOR CONTEMPT FOR FAILURE TO
OBEY JUDGMENT

United States of America
Western District of Washington
Northern Division—ss:

Lewis L. Stedman, being first duly sworn, on oath deposes and says:

That he is the Lewis L. Stedman designated in the Petition in Condemnation as Liquidating Trustee of Skinner and Eddy Shipbuilding Company, a dissolved corporation, and is the Secretary of Skinner & Eddy Corporation, each a designated defendant in the original petition in condemnation.

That there was served upon affiant, as Liquidating Trustee and as Secretary of Skinner & Eddy Corporation, a Notice from Sherman B. Green, "Chief, Seattle Sub-Office", being identical with the notice attached to the petition herein and marked Exhibit "B".

That on September 9th, 1943, affiant endeavored to enter the premises sought to be condemned, being the identical [46] premises upon which hearing was had in this Court and cause and the order entered denying necessity of taking and right to possession (Exhibit "B" attached to the petition herein) and was met by the armed forces of the United States, and access to said premises denied until he was duly recognized.

Thereupon he was permitted to enter said premises for a conference with Major S. N. Tidemon, Jr. and said Sherman B. Green, who were then and now are in complete possession of said premises in behalf of the War Department of the United States.

LEWIS L. STEDMAN

Subscribed and sworn to before me this 11th day of September, 1943.

(Seal) /s/ J. L. CORRIGAN

Notary Public in and for the State of Washington,
residing at Seattle. [47]

[Title of District Court and Cause.]

AFFIDAVIT OF SAMUEL C. HORNER IN
SUPPORT OF PETITION TO PUNISH
FOR CONTEMPT FOR FAILURE TO
OBEY JUDGMENT

United States of America
Western District of Washington
Northern Division—ss:

Samuel C. Horner, being first duly sworn, on oath deposes and says:

I am the Secretary of Merchants Transfer & Storage Company, a corporation, one of the petitioners above named, and one of the defendants in the "Petition in Condemnation".

I have read and verified the original Petition for

Rule and Attachment in re: Contempt, and the matters therein alleged are true.

That affiant attended all phases of the hearing before this Court in the application of the Petitioner in Condemnation for immediate possession of the premises in said petition described.

That said premises are the identical premises seized, as hereinafter stated, by Petitioner, acting through the War Department and after the entry of the order denying the [48] necessity of taking and the right to possession. (Exhibit "A" attached to the petition herein).

That the Merchants Transfer & Storage Company was conducting its business as usual in said premises when, at about the hour of 5:50 P. M., August 8th, 1943, and at a time when, as petitioner is informed and believes, all United States District Judges in this District were absent from the District and attending upon a Circuit and District Judges' Conference in San Francisco, California, the United States of America, Petitioner in Condemnation, through Sherman B. Green, subscribing himself as "Chief, Seattle Sub-Office" of the War Department, had served upon affiant, upon said premises, the Notice attached to the Petition herein and marked "Exhibit B."

That at the same time, Major S. N. Tidemon, Jr., of the United States Army, accompanied by armed forces of the United States Army, forcibly seized possession of said premises, posted notices that same had been occupied by the United States Government

and placed armed forces of the United States in and about said premises.

That said Tidemon did further direct that no shipments of merchandise would be permitted to enter said premises; that cars with merchandise on the siding might be unloaded on the platform but the merchandise not placed in said premises.

That the said Green and said Tidemon, with armed forces of the United States, as aforesaid, physically seized the immediate possession and use of said premises and have ousted Merchants Transfer & Storage Company, a corporation, from the occupancy and use thereof.

That said Tidemon notified affiant to inform all his customers that no merchandise could be or would be permitted [49] to be received at said premises and on affiant's refusal so to do without the advice of counsel, said Green and said Tidemon began such notification of affiant's customers directly.

SAMUEL C. HORNER

Subscribed and sworn to before me this 11th day of September, 1943.

(Seal) J. L. CORRIGAN

Notary Public in and for the State of Washington,
residing at Seattle.

(Copy Recd 9-11-43 F. P. Keenan)

[Endorsed]: Filed Sept. 13, 1943. [50]

[Title of District Court and Cause.]

NOTICE OF INTENTION TO APPEAR AND
ASK LEAVE OF COURT TO FILE PETI-
TION

To the United States District Court of America,
the petitioner above named, and

To Ernest Falk, United States Attorney, attorney
for petitioner above named:

You Are Hereby Notified and Will Please Take Notice, that at the opening of the above entitled court, at the hour of 10:00 o'clock in the forenoon, on Monday, the 13th day of September, 1943, or as soon thereafter as counsel can be heard, at the court-room of the above entitled court in the City of Seattle, State of Washington, the Respondents, Merchants Transfer & Storage Company, a corporation, Skinner & Eddy Corporation, a corporation, and Lewis L. Stedman, Liquidating Trustee of Skinner & Eddy Shipbuilding Company, a dissolved corporation, by the undersigned, their attorneys, will apply to the court and ask leave of the court for permission to file their petition herein, a copy of which petition is hereto attached and served upon you, and based on said petition will at said time apply to the court for a rule of attachment as and for contempt of court directed to and against the following named persons, who are named in Paragraph IX of said petition, namely: Sherman B. Green, Major S. N. Tidemon, Jr., and Honorable Robert P. Patterson, Under-Secretary of War, and

Honorable Henry L. Stimson, Secretary of War, and also directed to and against all persons acting by, through or under them or any of them, or in concert with them, or any of them, and that said Respondents will also at said time apply to the court for an order requiring the said above named persons, and all persons acting by, through or under them or any of them, or in concert with them or any of them, forthwith to remove from and vacate the premises referred to in said petition, and requiring them, and each of them, [51] forthwith to restore to the Respondents the quiet and peaceful possession of said premises and the whole and every part thereof, and to cease and desist from interfering with the Respondents in their possession of said property, or any part thereof, and the Respondents will also at said time and place apply to the court for such other and further orders of court and rules as shall be meet in the the premises.

Dated at Seattle, Washington, September 11, 1943.

/s/ ROY D. ROBINSON

/s/ TRACY E. GRIFFIN RDR

Attorneys for Merchants
Transfer & Storage Com-
pany

/s/ LEWIS L. STEDMAN

Attorney for Skinner & Eddy
Corporation

/s/ LEWIS L. STEDMAN

Liquidating Trustee of Skinner & Eddy Shipbuilding Company, a dissolved corporation.

9/11/43

Copy Rec'd

Dept. of Justice

F. P. Keenan

[Endorsed]: Filed Sept. 13, 1943. [52]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

This matter coming on for hearing upon the petition of the Merchants Transfer & Storage Company and Skinner & Eddy Corporation, and it appearing to the court that the importance of the matter and the ends of justice require as early a hearing on the show cause order herein entered as possible, and considering the advice of counsel.

It Is Hereby Ordered that the Honorable Henry L. Stimson, Secretary of War, the Honorable Robert P. Patterson, Under Secretary of War, Herman B. Green, Major S. N. Tiedeman, Jr. and the United States of America appear before this Court in its Court Room, at the United States Court House, in Seattle, Washington, on the 20th day of September, 1943, at 2:30 o'clock in the afternoon, and at said time and place to show cause, if [53] any they

have, why all of the relief demanded in the prayer of the petition of the Merchants Transfer & Storage Co. and the Skinner & Eddy Corporation filed herein on September 13, 1943 should not be granted and why the natural persons, to-wit, the Honorable Henry L. Stimson, Secretary of War, the Honorable Robert P. Patterson, Under Secretary of War, Herman B. Green, Major S. N. Tiedeman, Jr. should not be punished for contempt for not abiding the order of this court, dated August 13, 1943, and to further show cause why said natural persons, and each of them, and the United States of America should not forthwith restore the possession of the property described in the petition of condemnation and in the property owner's petition to the Merchants Transfer & Storage Co. and the Skinner & Eddy Corporation.

It Is Further Ordered that the service of this show cause order forthwith be made upon the Honorable Henry L. Stimson, Secretary of War, the Honorable Robert P. Patterson, Under Secretary of War, Herman B. Green, and Major S. N. Tiedeman, Jr. by day letter telegram stating a synopsis of the contents hereof to each of them wherever they may be found and by mailing to each of said persons an uncertified copy of this order by ordinary mail, postage prepaid, to their last known post office addresses and that the service of this order may be made upon the United States of America by delivery of an uncertified copy thereof to its counsel of record.

Done In Open Court this 17th day of September,
1943.

JOHN C. BOWEN

District Judge

[Endorsed]: Filed Sept. 17, 1943. [54]

[Title of District Court and Cause.]

MARSHAL'S RETURN ON ORDER TO SHOW
CAUSE

I hereby certify and return that in accordance with the Order To Show Cause entered in the above described cause on September 17, 1943, on September 17, 1943 I did cause a day letter telegram stating a synopsis of the contents of said Order to Show Cause to be sent via Western Union Telegraph Company to the Honorable Henry L. Stimson, Secretary of War, and to the Honorable Robert P. Patterson, Under Secretary of War, both at Washington, D. C., to Sherman B. Green and Major S. N. Tiedeman, Jr., both at U. S. Army Office of the Division Engineer, 351 California Street, San Francisco, California.

I further certify and return that on the same date, namely September 17, 1943, I did mail by ordinary mail uncertified copies of said Order to Show Cause to each of the above named persons at their last known post office address as follows: Honorable Henry L. Stimson and Honorable Robert P. Patterson, both at Washington, D. C., Sher-

man B. Green at Real Estate sub-office, 217 Lloyd Building, Seattle, Washington, and Major S. N. Tiedeman, Jr., at Office of Division Engineers, San Francisco Branch Office, 351 California Street, San Francisco, California.

H. W. ALGEO

United States Marshal

By DONALD F. MILLER

Chief Deputy

Marshal's costs—\$8.12

[Endorsed]: Filed Sept. 20, 1943. [55]

Return On Service of Writ

No. 781

United States of America,

Western District of Washington—ss:

United States of America vs. 43,355 Square Feet of
Land, more or less, Situate in King County,
State of Wash. et al.

I hereby certify and return that I served the annexed Order to Show Cause on the therein-named F. P. Keenan by handing to and leaving a true and correct copy thereof with him personally at Seattle, Washington in said District on the 17th day of September, 1943.

H. W. ALGEO

U. S. Marshal.

By PATRICK J. BRADLEY

Deputy

Marshal's fee \$2.00

[Endorsed]: Filed Sept. 20, 1943. [56]

[Title of District Court and Cause.]

PLEA TO JURISDICTION

Comes Now the United States of America, appearing specially and solely for the purpose of this motion, and hereby moves the court for an order to quash and vacate the Order to Show Cause, entered September 17, 1943, upon the following grounds:

1. That the court has no jurisdiction to review the official acts of the Secretary of War, in determining that the use of the property involved in the above-entitled action is necessary for military purposes.

2. That the proceeding instituted by the filing of respondent's Petition for Rule and Attachment In Re Contempt, constitutes a proceeding separate and apart from the above-entitled condemnation case, and the United States of America has not consented to be sued in the proceedings instituted by the filing of said Petition for Rule and Attachment In Re Contempt.

3. That a suit for an injunction against the United States will not lie. [57]

4. That this court is without jurisdiction to enjoin officials of the United States of America, where the result would be to enjoin the United States of America.

Dated at Seattle, Washington, September 20, 1943.

NORMAN M. LITTELL

Assistant Attorney General

F. P. KEENAN

Special Assistant to The At-
torney General

ERNEST FALK

Special Attorney Department
of Justice

[Endorsed]: Filed Sept. 20, 1943. [58]

[Title of District Court and Cause.]

MOTION TO QUASH AND VACATE ORDER
TO SHOW CAUSE ENTERED SEPTEMBER 17, 1943.

Comes Now Henry L. Stimson, Secretary of War, by his undersigned attorneys, and appearing specially and solely for the purpose of this motion, and hereby moves the Court to quash and vacate the order to show cause entered September 17, 1943, directed to the Honorable Henry L. Stimson, Secretary of War. This motion is based upon the following grounds:

1. This Court has no jurisdiction of the person of said Henry L. Stimson.
2. Henry L. Stimson has not been lawfully served with process or notice.

Dated at Seattle, Washington, September 20, 1943.

NORMAN M. LITTELL

Assistant Attorney General

F. P. KEENAN

Special Assistant to The At-
torney General

[Endorsed]: Filed Sept. 20, 1943. [59]

[Title of District Court and Cause.]

MOTION TO QUASH AND VACATE ORDER
TO SHOW CAUSE ENTERED SEPTEMBER 17, 1943.

Comes Now Robert P. Patterson, Under Secretary of War, by his undersigned attorneys, and appearing specially and solely for the purpose of this motion, and hereby moves the Court to quash and vacate the order to show cause entered September 17, 1943, directed to the Honorable Robert P. Patterson, Under Secretary of War. This motion is based upon the following grounds:

1. This Court has no jurisdiction of the person of said Robert P. Patterson.

2. Robert P. Patterson has not been lawfully served with process or notice.

Dated at Seattle, Washington, September 20, 1943.

NORMAN M. LITTELL

Assistant Attorney General

F. P. KEENAN

Special Assistant to The At-
torney General

[Endorsed]: Filed Sept. 20, 1943. [60]

[Title of District Court and Cause.]

MOTION TO QUASH AND VACATE ORDER
TO SHOW CAUSE ENTERED SEPTEMBER 17, 1943.

Comes Now Major S. N. Tideman, Jr., by his undersigned attorneys, and appearing specially and solely for the purpose of this motion, and hereby moves the Court to quash and vacate the order to show cause entered September 17, 1943, directed to Major S. N. Tideman, Jr. This motion is based upon the following grounds:

1. This Court has no jurisdiction of the person of said Major S. N. Tideman, Jr.
2. Major S. N. Tideman, Jr. has not been lawfully served with process or notice.

Dated at Seattle, Washington, September 20, 1943.

NORMAN M. LITTELL

Assistant Attorney General

F. P. KEENAN

Special Assistant to The At-
torney General

[Endorsed]: Filed Sept. 20, 1943. [61]

[Title of District Court and Cause.]

MOTION TO QUASH AND VACATE ORDER
TO SHOW CAUSE ENTERED SEPTEMBER 17, 1943.

Comes Now Sherman B. Green, appearing specially and solely for the purpose of this Motion, and hereby moves the court to quash and vacate the order to show cause, entered September 17, 1943, directed to the said Sherman B. Green.

This Motion is based upon the following grounds:

1. That this court has no jurisdiction of the person of the said Sherman B. Green, for the reason that the relief prayed for against the said Sherman B. Green in the Petition for Rule and Attachment In Re Contempt, filed September 13, 1943, cannot lawfully be granted, because to do so would, in effect, enjoin the United States, which is not subject to injunction.

2. That it affirmatively appears from the respondent's Petition for Rule and Attachment In Re Con-

tempt, hereinbefore mentioned, and the files and records in the above-entitled case, that no order of court has been violated by the said Sherman B. Green, or at all.

3. That the Secretary of War is an indispensable party to this proceeding, and until the Secretary of War becomes subject to the jurisdiction of this court in this proceeding, the said Sherman B. Green is not subject to the said show-cause order. [62]

4. That it affirmatively appears from the respondent's Petition for Rule and Attachment In Re Contempt that Sherman B. Green is a subordinate in the War Department and cannot be punished for contempt, or enjoined for carrying out his orders from the Secretary of War, or the said Sherman B. Green's immediate superior.

Dated at Seattle, Washington, September 20, 1943.

NORMAN M. LITTELL

Assistant Attorney General

F. P. KEENAN

Special Assistant to The At-
torney General

ERNEST FALK

Special Attorney

[Endorsed]: Filed Sept. 20, 1943. [63]

In the District Court of the United States
For the Western District of Washington
Northern Division

No. 781

UNITED STATES OF AMERICA,

Petitioner,

vs.

43,355 SQUARE FEET OF LAND, MORE OR
LESS, SITUATE IN KING COUNTY,
STATE OF WASHINGTON:

MERCHANTS TRANSFER & STORAGE COM-
PANY, a corporation; SKINNER & EDDY
CORPORATION, a corporation; LEWIS L.
STEDMAN, Liquidating Trustee of Skinner
and Eddy Shipbuilding Company, a dissolved
corporation;

KING COUNTY, WASHINGTON, a municipal
corporation,

UNKNOWN OWNERS, being all other persons or
parties unknown having or claiming any right,
title, estate, lien or interest in the real estate
described in the petitioner herein,

Respondents.

ORDER DIRECTING RETURN
OF PROPERTY ETC.

Be It Remembered, this matter having come on
to be heard upon the Return Day to that certain

Order to Show Cause issued out of this Court and cause September 17th, 1943, directing the Honorable Henry L. Stimson, Secretary of War, Honorable Robert P. Patterson, Under Secretary of War, Herman B. Green, Major S. N. Tiedeman, Jr., and the United States of America to show cause why said natural persons named—"should not be punished for contempt for not abiding the order [82] of this court, dated August 13, 1943, and to further show cause why said natural persons, and each of them, and the United States of America should not forthwith restore the possession of the property described in the petition of condemnation and in the property owner's petition to the Merchants Transfer & Storage Co. and the Skinner & Eddy Corporation"; and

Proof of service of said order having been had as directed therein, as shown by return of United States Marshal; and

The petitioners appearing by Geo. H. Rummens, Tracy E. Griffin and Lewis L. Stedman, their attorneys; and

The United States of America appearing specially and filing a plea to jurisdiction through its attorneys, Norman M. Littell, Assistant Attorney General, F. P. Keenan, Special Assistant to the Attorney General, and Ernest Falk, Special Attorney, Department of Justice; and

The Honorable Henry L. Stimson, Secretary of War, Honorable Robert P. Patterson, Under Secretary of War, appearing specially by said Assistant Attorney General and Special Assistant by way of

“Motion to Quash and Vacate Order to Show Cause entered September 17th, 1943”; and

Sherman B. Green appearing by said Assistant Attorney General, Special Assistant and Special Attorney by way of “Motion to Quash and Vacate Order to Show Cause entered September 17th, 1943”; and

This Court having heard argument of counsel and being advised in the premises did overrule the plea to jurisdiction of the United States of America; and

The matter after further argument having been [83] submitted to the Court for determination; and

This Court finding that the natural persons cited have not done anything required or forbidden by the Court and having done whatever they may have done with respect to the possession of said property outside of the presence of the Court, and have therefore not personally violated this Court’s order of August 13th, 1943, and are not in contempt,

It Is Ordered that the Honorable Henry L. Stimson, Secretary of War, the Honorable Robert P. Patterson, Under Secretary of War, Herman B. Green, and Major S. N. Tiedeman, Jr., are not in contempt of this Court, and the application for rule and attachment as to said natural persons be, and the same hereby is, denied; and

This Court finding that the plaintiff, United States of America, has taken possession of the property in issue unlawfully and without right and contrary to this Court’s order of August 13th, 1943, denying it immediate possession,

It Is Ordered, Adjudged and Decreed that the United States of America forthwith return said property, and the whole thereof, being the property in the petition for condemnation more particularly described, to the possession of Merchants Transfer & Storage Company, a corporation, Skinner & Eddy Corporation, a corporation, and Lewis L. Stedman, Liquidating Trustee of Skinner & Eddy Shipbuilding Company, a dissolved corporation, and that the United States of America forthwith, upon the entry of this order, vacate said premises; and

The United States of America, through its attorneys of record, having stated in open Court that possession will not be surrendered and the Mandate of this Court obeyed, [84]

It Is Ordered that if upon the entry of this order possession is not forthwith restored to said parties named, then the United States of America will be later assessed as for contempt damages the amount thereof to be ascertained by further hearings herein, at which hearings consideration may be given to such damages as those entitled to possession will suffer from day to day during the time that the United States of America wrongfully withholds that possession. To the entry of those portions of the foregoing order adverse to it the United States of America excepts and its exception is allowed.

Done In Open Court this 21st day of September,
1943.

JOHN C. BOWEN

District Judge

RUMMENS & GRIFFIN

and

LEWIS L. STEDMAN

Attorneys for Respondents (now Petitioner)

LEWIS L. STEDMAN

1107 American Bldg.

Seattle, Washington.

Presented By:

TRACY E. GRIFFIN

[Endorsed]: Filed Sept. 21, 1943. [85]

[Title of District Court and Cause.]

EXCEPTIONS TO ORDER DIRECTING
RETURN OF PROPERTY, ETC.

Petitioners, separately, except to the following parts and portions of the Order Directing Return of Property, Etc., entered in the above entitled cause, entered herein Sept. 21, 1943:

“This Court finding that the natural persons cited have not done anything required or forbidden by the Court and having done whatever they may have done with respect to the possession of said property outside of the presence of the Court, and have therefore not personally

violated this Court order of August 13th, 1943,
and are not in contempt.”

And Further except to the refusal of the Court
to find the Honorable H. L. Simpson, Secretary of
War, guilty of contempt; and

Further Except to the refusal of the Court to
find the Honorable Robert P. Patterson, Under
Secretary of War, guilty of contempt; and [86]

Further Except to the refusal of the Court to
find Herman B. Green guilty of contempt; and

Further Except to the refusal of the Court to
find Major S. N. Tiedeman, Jr. guilty of contempt.

RUMMENS & GRIFFIN and
LEWIS L. STEDMAN
LEWIS L. STEDMAN
TRACY E. GRIFFIN

Attorneys for Petitioner
1107 American Bldg.,
Seattle, Washington

The foregoing exceptions are hereby allowed.

JOHN C. BOWEN

Judge

[Endorsed]: Filed Sept. 21, 1943. [87]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the District Court of the United States for the Western District of Washington, Northern Division, and

To Merchants Transfer & Storage Company, a corporation, and Roy D. Robinson and Rummens & Griffin, its attorneys, Skinner & Eddy Corporation, a corporation, and Lewis L. Stedman, its attorney, and Lewis L. Stedman, Liquidating Trustee of Skinner and Eddy Shipbuilding Company, a dissolved corporation, and

To King County, Washington, a municipal corporation.

Notice is hereby given that the United States of America, petitioner in the above-entitled action, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from that portion of the order designated as "Order Directing Return of Property," entered September 21, 1943, in the above-entitled action, which ordered and decreed that the United States [88] of America forthwith vacate and return the property described in the Petition for Condemnation in the above-entitled case to the possession of Merchants Transfer & Storage Company, a corporation, Skinner & Eddy Corporation, a corporation, and Lewis L. Stedman, Liquidating Trustee of Skinner and Eddy Shipbuilding Company, a dissolved corporation, and

which ordered that if the United States of America does not forthwith restore possession to said parties upon the entry of the order directing return of said property, the United States of America will be assessed damages as for contempt.

Dated at Seattle, Washington, this 27th day of September, 1943.

NORMAN M. LITTELL

Assistant Attorney General

F. P. KEENAN

Special Assistant to The
Attorney General

ERNEST FALK

Special Attorney

Department of Justice

Attorneys for

United States of America

Office and Post Office Address:

Department of Justice

Washington, 25, D. C.

or

655 Skinner Building

Seattle, 1, Washington

[Endorsed]: Filed Sept. 27, 1943. [89]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the District Court of the United States for the Western District of Washington, Northern Division, and

To United States of America, Petitioner, and Norman M. Littell, Assistant Attorney General, F. P. Keenan, Special Assistant to the Attorney General, Ernest Falk, Special Attorney, Department of Justice, as Attorneys for the United States of America, and

To King County, Washington, a municipal corporation:

Notice Is Hereby Given that Merchants Transfer & Storage Company, a Corporation, Skinner & Eddy Corporation, a Corporation, and Lewis L. Stedman, Liquidating Trustee [90] of Skinner and Eddy Shipbuilding Company, a dissolved corporation, Respondents in the above entitled action, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from that portion of the order designated as "Order Directing Return of Property" entered September 21st, 1943, in the above entitled action, which ordered and decreed that the Honorable Henry L. Stimson, Secretary of War, Honorable Robert P. Patterson, Under Secretary of War, Herman B. Green, and Major S. N. Tiedeman, Jr., were not in contempt of the Court "and the application for rule and attachment as to said natural persons be, and the same hereby is denied."

Dated at Seattle, Washington, this 4th day of October, 1943.

ROY D. ROBINSON and
RUMMENS & GRIFFIN
TRACY E. GRIFFIN

Attorneys for Respondents,
Merchants Transfer & Storage Company, a Corporation.

LEWIS L. STEDMAN
LEWIS L. STEDMAN

Attorney for Respondent,
Skinner & Eddy Corporation and Lewis L. Stedman,
Liquidating Trustee of
Skinner and Eddy Shipbuilding Company, a dissolved corporation.

[Endorsed]: Filed Oct. 4, 1943. [91]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

Now on this 4th day of October, 1943, there is presented to the Court the Petition of Respondents, Merchants Transfer & Storage Company, a corporation, Skinner & Eddy Corporation, a corporation, Lewis L. Stedman, Liquidating Trustee of Skinner and Eddy Shipbuilding Company, a dissolved corporation, praying for an appeal herein to the United

States Circuit Court of Appeals for the Ninth Circuit, and it appearing that respondents are appealing from a portion only of that certain order directing return of property entered September 21st, 1943, [92] and refusing to adjudge the natural persons involved in contempt and that said Respondents appeal and urge as error only that portion of said order,

It Is Therefore Ordered by the Court that an appeal be, and the same is hereby allowed said Respondents, as provided by law, to the United States Circuit Court of Appeals for the Ninth Circuit from that portion of said order refusing to find said natural persons, Honorable Henry L. Stimson, Secretary of War, Honorable Robert P. Patterson, Under Secretary of War, Herman B. Green and Major S. N. Tiedeman, Jr., in contempt; and

It appearing that the Petitioner, United States of America, has duly appealed from the other portions of said order,

It Is Ordered that a single transcript of the proceedings in said cause as same is now being prepared by the first appellant, United States of America, will be sufficient in all particulars upon this appeal; and

It Is Ordered that Citation Issue as provided by law, and the Respondents herein shall file bond for costs.

Dated at Seattle, Washington, this 4th day of October, 1943.

JOHN C. BOWEN

District Judge

ROY D. ROBINSON and

RUMMENS & GRIFFIN

TRACY E. GRIFFIN

Attorneys for Respondents,

Merchants Transfer & Storage Company,
a corporation

LEWIS L. STEDMAN

LEWIS L. STEDMAN

Attorney for Respondents,

Skinner & Eddy Corporation and Lewis L.
Stedman, Liquidating Trustee, Skinner
and Eddy Shipbuilding Company, a dis-
solved corporation.

[Endorsed]: Filed Oct. 4, 1943. [93]

[Title of District Court and Cause.]

CONCISE STATEMENT OF POINTS TO BE
RELIED UPON ON APPEAL

The appellant, The United States of America, makes the following concise statement of points it intends to rely upon on appeal:

1. The trial court erred in overruling United States of America's Plea to Jurisdiction.
2. The trial court erred in not holding that the United States of America was rightfully in possession of the premises involved.

3. The trial court erred in holding that the United [98] States of America had taken possession of the condemned property unlawfully and without right, and contrary to the trial court's order of August 13, 1943.

4. The trial court erred in holding that there was an order that could have been violated by the United States of America.

5. The trial court erred in issuing a mandatory injunction against the sovereign, United States of America.

6. The trial court erred in decreeing that in the event said mandatory injunction was not obeyed, the sovereign, United States of America, would be assessed damages for contempt of court.

NORMAN M. LITTELL

Assistant Attorney General

VERNON L. WILKINSON

F. P. KEENAN

ERNEST FALK

Attorneys for Petitioner

(Copy of within received Oct. 25, 1943)

LLOYD SHORETT

Prosecuting Attorney.

Copy Received

Date Oct. 25, 1945

ROY D. ROBINSON &

RUMMENS & GRIFFIN

Attorneys for Merchants Tfr.
& Stor. Co.

Copy recd. 10/25/43

LEWIS L. STEDMAN

Atty for Skinner & Eddy
Corp.

[Endorsed]: Filed Oct. 25, 1943. [99]

[Title of District Court and Cause.]

DESIGNATION OF THE PORTIONS OF THE
RECORD, PROCEEDINGS AND EVIDENCE
TO BE CONTAINED IN THE RECORD
ON APPEAL

The appellant, The United States of America, designates the following to be included in the record on appeal:

1. Petition in Condemnation, filed August 2, 1943.
2. Motion to Dismiss under Rule 12-B, filed August 4, 1943.
3. Court's Oral Decision, filed August 11, 1943.
4. Findings of Fact and Conclusions of Law, filed August 13, 1943.
5. Order denying the necessity of taking and the [100] right to possession, filed August 13, 1943.
6. Petition for Rule and Attachment in re Contempt, filed September 13, 1943.
7. Notice of Presentation of Petition, filed September 13, 1943.
8. Order to Show Cause, filed September 17, 1943.
9. Plea to jurisdiction, filed September 20, 1943.

10. Motion of Henry L. Stimson, appearing specially, to quash and vacate Order to Show Cause, filed September 20, 1943.

11. Motion of Robert P. Patterson, appearing specially, to quash and vacate Order to Show Cause, filed September 20, 1943.

12. Motion of Major S. M. Tideman, Jr., appearing specially, to quash and vacate Order to Show Cause, filed September 20, 1943.

13. Motion of Sherman B. Green, appearing specially, to quash and vacate Order to Show Cause, filed September 20, 1943.

14. Court's Opinion re Plea to Jurisdiction, filed October 4, 1943, as of September 21, 1943.

15. Court's Opinion re Contempt Proceedings, filed September 21, 1943.

16. Order Directing Return of Property, etc., filed September 21, 1943.

17. Respondents' Exceptions to Order Directing Return of Property, etc., filed September 21, 1943.

18. Notice of Appeal by the United States of America, Petitioner, filed September 27, 1943.

19. Notice of Appeal by the Merchants Transfer & Storage Company, a corporation; Skinner & Eddy Corporation, a corporation; Lewis L. Stedman, Liquidating [101] Trustee of Skinner and Eddy Shipbuilding Company, a dissolved corporation, filed October 4, 1943.

20. Order allowing appeal, filed October 4, 1943.

21. Narrative Statement of Testimony taken August 4th and 5th, filed October 5, 1943, and Reporter's transcript of testimony taken August 7, 1943, filed October 4, 1943.

22. Transcript of Proceedings on October 4, 1943, and Court's Oral Opinion, filed October 5, 1943.

23. Certificate of Judge with respect to transcript of testimony and opinions and decisions of Court, filed October 5, 1943.

24. Petitioner's Exhibits 1, 2, 3 and 4.

25. Respondents' Exhibits A-1 and A-2.

26. Appellant's Statement of Points to be relied upon on appeal.

27. This designation.

NORMAN M. LITTELL

Assistant Attorney General

VERNON L. WILKINSON

F. P. KEENAN

ERNEST FALK

Attorneys for Petitioner

Copy of within received Oct. 25, 1943.

LLOYD SHORETT

Prosecuting Attorney.

Copy Received Date Oct. 25, 1943

ROY D. ROBINSON &

RUMMENS & GRIFFIN

Attorneys for Merchants Tfr.
& Stor. Co.

Copy recd. 10/25/43 .

LEWIS L. STEDMAN

Atty for Skinner & Eddy
Corp.

[Endorsed]: Filed Oct. 25, 1943. [102]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
THE RECORD ON APPEAL AND DOCK-
ETING THE ACTION

There having come on regularly for hearing motion of Petitioner for entry of an order extending the time for filing the record on appeal and docketing the action, the Court having considered the motion and affidavit of F. P. Keenan in support thereof and the files and records herein, it appearing to the Court that the time within which the Petitioner may file the record on appeal and docket the action has not yet expired, and the Court being fully advised in the premises, now therefore,

It is hereby Ordered that the time within which the Petitioner, The United States of America, may file the record on appeal and docket the action in the Circuit Court of Appeals for the Ninth Circuit is extended to December 6, 1943.

Done in Open Court October 26, 1943.

LLOYD L. BLACK

United States District Judge

Presented and Approved by:

NONA F. COX

Special Attorney, Department
of Justice

Approved by:

ROY D. ROBINSON

By T. E. G.

RUMMENS & GRIFFIN

By TRACY E. GRIFFIN

Attorneys for Respondents

LEWIS L. STEDMAN

Atty for Skinner & Eddy
Corp. Lewis L. Stedman,
Liquidating Trustee Skinner
& Eddy Shipbuilding
Co.

[Endorsed]: Filed Oct. 26, 1943. [103]

[Title of District Court and Cause.]

CONCISE STATEMENT OF POINTS TO BE
RELIED UPON UPON THE CROSS-AP-
PEAL

The Respondents and Cross-Appellants, Merchants Transfer & Storage Company, a corporation, Skinner & Eddy Corporation, a corporation, and Lewis L. Stedman, Liquidating Trustee of Skinner and Eddy Shipbuilding Company, a dissolved corporation, make the following concise statement of points they intend to rely upon on appeal:

I.

The Trial Court erred in sustaining the plea to jurisdiction. [104]

II.

The Trial Court erred in holding that the petition stated a cause of action in seeking to condemn, as in the petition stated, a portion only of the leasehold interest specified.

III.

The Trial Court erred in holding that the constitutional rights of Cross-Appellants were not violated.

IV.

The Trial Court erred in not holding the individual persons, Henry L. Stimson, Robert P. Patterson, Herman B. Green and Major S. N. Tiedeman, Jr., in contempt of Court.

ROY D. ROBINSON and

RUMMENS & GRIFFIN

Attorneys for Respondent,

Merchants Transfer &

Storage Company, a

Corporation.

LEWIS L. STEDMAN

Attorney for Respondent,

Skinner & Eddy Corpora-

tion and Lewis L. Stedman.

Liquidating Trustee of

Skinner and Eddy Ship-

building Company, a dis-

solved corporation.

By TRACY E. GRIFFIN

[Endorsed]: Filed Nov. 2, 1943. [105]

[Title of District Court and Cause.]

RESPONDENTS' PROPOSED AMENDMENT
TO PETITIONER-APPELLANTS' —
“DESIGNATION OF THE PORTIONS OF
THE RECORD, PROCEEDINGS AND EVIDENCE TO BE CONTAINED IN THE RECORD ON APPEAL”

The Respondents and Cross-Appellants, Merchants Transfer & Storage Company, a corporation, et al designate that the additional be included in the record on appeal, to-wit:

8-a Return of United States Marshal in re service Order to Show Cause filed September 19th, 1943.

This Return is either a part of the file or entered [106] as an exhibit and if the Petitioner-Appellants' designation is not amended accordingly, than these Respondents in addition to the designation of Appellant do designate specifically as an addition thereto 8-a as aforesaid.

ROY D. ROBINSON and
RUMMENS & GRIFFIN

Attorneys for Respondents,
Merchants Transfer & Storage Company, a corporation

LEWIS L. STEDMAN

Attorney for Respondents,
Skinner & Eddy Corpora-
tion and Lewis L. Stedman,
Liquidating Trustee of
Skinner and Eddy Ship-
building Company, a dis-
solved corporation

By TRACY E. GRIFFIN

[Endorsed]: Filed Nov. 2, 1943. [107]

[Title of District Court and Cause.]

ORDER DIRECTING TRANSMITTAL OF
EXHIBITS TO THE CIRCUIT COURT OF
APPEALS

This cause having come on regularly for hearing, upon stipulation of the parties hereto for the entry of an order pursuant to Rule 75(i), Federal Rules of Civil Procedure, directing the Clerk of this Court to transmit to the Circuit Court of Appeals of the Ninth Circuit certain original exhibits introduced at the hearing of said cause, and the court having considered the stipulation and the files and records herein,

It is hereby Ordered that the exhibits mentioned in said stipulation, namely, Petitioner's Exhibits 1, 2, 3 and 4, and Respondents' Exhibits A-1 and A-2, be transmitted by the Clerk of this Court to the Clerk of the Circuit Court of Appeals for the Ninth

Circuit for the use of the Circuit Court of Appeals in the [107-a] consideration of this case on appeal, and thereafter, returned by him to the Clerk of this Court on remand of the cause to this Court.

Done in open Court this 9 day of November, 1943.

LLOYD L. BLACK

United States District Judge

Presented and approved by:

NONA F. COX

Special Attorney

Department of Justice

[Endorsed]: Filed Nov. 9, 1943. [107-b]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Judson W. Shorett, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered from 1 to 107b, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by Designation of Counsel filed and shown herein, as the same remain

of record and on file in the office of the Clerk of said District Court at Seattle, except as to the Narrative Statement and Transcript of Testimony as certified and filed October 5, 1943, the original of which is enclosed herewith as part of the record on appeal in this cause, [108] and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

Clerk's fees (Act of Feb. 11, 1925) for making record, certificate or return, 251 folios at 5c	\$12.55
Appeal fee (Sec. 5 of Act)	5.00
Certificate of Clerk to Transcript of Record....	.50
Certificate of Clerk to Original Exhibits.....	.50
<hr/>	
Total	\$18.55

I further certify that the foregoing fees have not been paid for the reason that the appeal is being prosecuted by the United States Government.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court

at Seattle, in said District, this 12 day of November, 1943.

[Seal]

JUDSON W. SHORETT,
Clerk

By TRUMAN EGGER.
Chief Deputy. [109]

[Title of District Court and Cause.]

NARRATIVE STATEMENT OF TESTIMONY
TAKEN AT HEARING ON AUGUST 4, 1943
AND AUGUST 5, 1943

Be It Remembered, that heretofore and on, to-wit, August 4, 1943, at the hour of 4:30 P. M., the above entitled cause came on for continuation of hearing therein before the Honorable John C. Bowen, one of the judges in the above entitled court;

Ivan Merrick, Esq., and Ernest Falk, Esq., appearing for and on behalf of petitioner;

Roy D. Robinson, Esq., and Tracy E. Griffin, Esq., appearing for and on behalf of respondent, Merchants Transfer & Storage Company;

Lewis L. Stedman, Esq., appearing for and on behalf of respondent, Skinner & Eddy Corporation;

Whereupon the following proceedings were had and done, to-wit:

LIEUTENANT-COLONEL
HARRY H. WATSON,

called as a witness on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

I am the Supply Officer of the Army Transport Service. I have charge of the purchasing and handling of supplies for the repair and outfitting of ships of the Army Transport Service at the Seattle Port of Embarkation. I am familiar with the property occupied by the Merchants Transfer & Storage Company, the temporary use of which the United States of America is seeking to condemn in this action. The building is a four story frame building with a part basement. It is entirely surrounded by other lands and buildings already in the possession of the Port of Embarkation or which is in the process of acquisition. The building in question is needed by my division of the Army Transport Service of the United States for the storage of military supplies, including repair parts for ships, such as pipes, castings, fittings, boiler plates and other heavy metal objects and also other various items used for outfitting and supplying vessels.

At the present time I have no storage space in the Port of Embarkation for use in this manner. We have no other space to store these articles. The volume of military traffic passing through the Port of Embarkation is increasing very rapidly. It is necessary for the United States to have the use of

(Testimony of Lieut.-Col. Harry H. Watson.)

this property for the successful prosecution of the war. The property is needed immediately and will be absolutely required within thirty days.

On

Cross-Examination

the witness testified as follows:

I do not know everything that will be stored in the building. The present plans provide for the use of a large part of the building by my department for storing ships' repair parts and supplies for ships which come under my jurisdiction. I am only concerned with that part of the building which will be used by my department. I am not familiar with the warehouse space in the City of Seattle which has been taken over by the various departments of the Government or how much thereof is actually in use. I only know about the amount of warehouse space available for my department. We would require a building having a floor load carrying capacity from 175 to 200 pounds per square foot.

In answer to direct question by the Court the witness stated that the pipes, castings and fittings could be stored outside temporarily, but not permanently, but that he would prefer to have it in a warehouse.

J. STANLEY MULLANE,

called as a witness on behalf of the petitioner having been first duly sworn, was examined and testified as follows:

I am an Associate Land Appraiser in the Seattle office of the Real [2*] Estate Branch of the U. S. Army Engineers. I am familiar with the property described in the Petition in Condemnation. It is shown in red on petitioner's Exhibit 1 (petitioner's Exhibit 1 admitted in evidence). This property under condemnation is completely surrounded by other property which is in the possession of the United States. The other property is either owned by the United States, is being leased by it, or the United States is in possession and the amount of rental is being negotiated.

On

Cross-Examination

the witness testified as follows:

The estate taken is for a term of years ending June 30, 1944, with the right of renewal. The reason for the term ending June 30, 1944 is that that date is the end of the fiscal year and Congress allots funds from year to year. That is the reason the term is stated as ending June 30, 1944, together with the right to renew and does not initially cover the entire period of the Merchants Transfer & Storage Company lease.

I do not know of any vacant warehouse building in the City of Seattle which is suitable for the Mer-

*Page numbering appearing at foot of page of original Reporter's Transcript.

(Testimony of J. Stanley Mullane.)

chants Transfer & Storage Company, to which it could move the merchandise stored in the building involved in this action. (Petitioner objects to this testimony and all testimony going to show that the respondent Merchants Transfer & Storage Company found it difficult or impossible to move their business elsewhere and also the use to which the building was being put by the Merchants Transfer & Storage Company. Objection overruled, exception allowed. It was stipulated by counsel and approved by the Court that petitioner should have a continuing objection and exception to this line of testimony).

There is no room in the Port of Embarkation area and particularly the area to the north of the building under consideration, upon which additional buildings could be constructed. Two new piers, designated as Pier D. and Pier E. are under construction and the space to the north and northwest of the building in question will be used in connection with those piers. The Army has taken possession and use of other buildings in this vicinity, either under lease or under condemnation. The Army has taken the Moran and Henry buildings on First Avenue South, the Goodrich Building on South Alaskan Way and the Stacy-Lander Street piers and warehouse of the Port of Seattle. [3]

R. C. ANDERSON,

called as a witness on behalf of the respondents, having been first duly sworn, was examined and testified as follows:

I am the Vice President of Skinner & Eddy Corporation, a corporation which is the owner of the property in question. On February 6, 1941, we leased the property to the Merchants Transfer & Storage Company for a period of five years, commencing March 1, 1941. This lease is still in good standing. A copy of the lease was introduced in evidence as respondents' Exhibit A-1.

RESPONDENTS' EXHIBIT No. A-1

This Indenture, executed in triplicate this sixth day of February 1941, by and between Skinner & Eddy Corporation, a Washington corporation, party of the first part, (hereinafter designated as the lessor) and Merchants Transfer & Storage Co., a Washington corporation, party of the second part, (hereinafter designated as the lessee),

Witnesseth: That in consideration of the covenants and agreements of the lessee hereinafter set forth and of the sum of Four Thousand Two Hundred Fifty And No/100 * * * * * (\$4,250.00) Dollars, now paid to the lessor by the lessee, the receipt whereof is hereby acknowledged, the said lessor does hereby lease and demise unto the said lessee those certain premises situate in the City of Seattle, King County, Washington, particularly described as follows, to-wit:

Beginning at the Northeast corner of Lot 3 of Black's Replat of Portions of Lots 18 and 19 of Block 368 Seattle Tide Lands and running thence North along the East line of said lot 3 produced North to the North line of Lot 17 of Block 368 of Seattle Tide Lands; thence West along said North line 290 feet to a point which is 448.616 feet West of the Northeast corner of said lot 17; thence South 13 feet; thence East 35 feet; thence South 45 feet to the South line of said lot 17; thence East along said South line 255 feet to the point of beginning; and

Lots 3, 4, 5 and 6 of Black's Replat of Portions of Lots 18 and 19 of Block 365 of Seattle Tide Lands.

On which is situated building known as 24 West Connecticut Street, auto sheds and yard.

for the purpose of conducting therein Storage and Transfer Business and for no other purpose whatsoever, for the term of Five (5) Years commencing on the first day of March 1941, and ending at the expiration of the twenty-eighth day of February 1946, at the monthly rental of Eight Hundred Fifty And No/100 * * * * * (\$850.00) Dollars, Rider hereto attached, marked Exhibit "A" and containing special clauses, is by reference thereunto made a part hereof.

payable in advance on the first day of each and every month during said term at the office of Henry Broderick Inc., Agents, at Second and Cherry, Seattle, Washington, or at such other place as the lessor may from time to time designate, which said

sum the lessee expressly covenants and agrees to pay at the time and in the manner herein stated.

The above payment of Four Thousand Two Hundred Fifty And No/100 * * * * (\$4,250.00) Dollars now made, shall, in the event of the full and faithful performance of all the covenants and agreements in this lease by the lessee to be performed, be credited in payment of the last one month's rent of each year of said term; otherwise said payment this day made shall belong to the lessor as part of the consideration to lessor for the execution of this lease.

Said premises are accepted by lessee in their present condition, and shall be kept in good order, condition and repair during the term of this lease by the lessee at lessee's sole cost and expense, except outside walls, roof and foundation, and the lessee agrees that at the expiration of the said term or sooner termination of this lease, lessee will quit and surrender the said premises without notice and in good order, condition and repair, damage by the elements or fire excepted.

Said lessee agrees that the lessor or lessor's agents, shall not be held for any damage to property, or personal injuries caused by any defects now in said premises or hereafter occurring in or about said premises.

And it is further agreed that all personal property in said demised premises shall be at the risk of lessee only, and that lessor or lessor's agents shall not be liable for any damage, either to person or property, sustained by lessee or other persons, due to the building in which said demised premises are

situate, or any part or appurtenances thereof becoming out of repair or rising from the bursting or leakage of water, gas, sewer or steam pipes, or from any act or neglect of employees, co-tenants or other occupants of said building, or any other person, or due to the happening of any accident from whatsoever cause in and about said building.

This lease or any part hereof shall not be assigned by lessee, or by operation of law, or otherwise, nor said premises or any part thereof sublet without the written consent of the lessor endorsed hereon; and in the event such written consent shall be given, no other or subsequent assignment, assignments or subletting, shall be made by such assignee or assignees or sublessee without previous consent of lessor first had and obtained in writing.

The lessor shall not be called upon to make any improvements or repairs of any kind upon said premises, and said premises shall at all times be kept in good order, condition and repair as aforesaid, by lessee, and shall also be kept and used in accordance with the laws of the State of Washington and ordinances of the City of Seattle, and in accordance with all directions, rules and regulations of the health officer, fire marshal, building inspector, or other proper officer of the City of Seattle, at the sole cost and expense of said lessee and lessee will keep the said premises in a clean, sanitary, wholesome and safe condition in accordance with all directions of all proper officers of the City of Seattle, and State of Washington, and will perform all re-

quirements of law, ordinance or otherwise, touching said premises; that lessee will permit no waste, damage, or injury to said premises, and at lessee's own cost and expense, will keep all drainage pipes free and open and will protect water, heating and other pipes so that they will not freeze or become clogged, and will repair all leaks, and will also repair all damages caused by leaks or by reason of lessee's failure to protect and keep free, open and unfrozen any of the pipes and plumbing on said premises.

The lessee will allow the said lessor or lessor's agents, free access at all reasonable times to said premises for the purpose of inspection or of making repairs, additions or alterations to the demised premises or any property owned by or under control of lessor, but this right shall not be construed as an agreement on the part of lessor to make any repair, all of such repairs to be made by the lessee as aforesaid.

In the event lessee becomes voluntarily or involuntarily bankrupt, or if a receiver, assignee, or other liquidating officer is appointed for the business of said lessee then this lease shall be void, if the lessor shall so elect.

In the event said premises shall be destroyed or damaged by the elements or fire to such an extent as to render the same untenable in whole or in a substantial part thereof it shall be optional with the lessor to rebuild or repair the same; and after the happening of any such contingency, the lessee shall have the right to declare this lease terminated

by written notice served upon the lessor, unless the said lessor or lessor's agents shall within twenty days after such destruction or damage notify the said lessee in writing of lessor's intention to rebuild or repair said premises or the part so damaged as aforesaid, and if lessor elects to rebuild or repair said premises lessor shall prosecute the work of such rebuilding or repairing without unnecessary delay and, during such period the rent of said premises shall be abated in the same ratio that that portion of the said premises rendered for the time being unfit for occupancy shall bear to the whole of said leased premises.

And it is further provided and agreed that in the event the building in which said premises hereby leased are located, shall be destroyed or damaged by fire, earthquake or other casualty (even though said premises hereby leased shall not be affected by said fire, earthquake or other casualty) to such an extent that in the opinion of lessor it shall not be practicable to rebuild or repair, then it shall be optional with lessor to terminate this lease by written notice served on lessee within ten days after such destruction or damage.

Any notice required to be served in accordance with the two preceding paragraphs of this lease shall be sent by registered mail, the notice from the lessee to be sent to the lessor in care of lessor's agents, and the notice from the lessor to be sent to lessee at the demised premises.

The lessee agrees that lessee will not display in the windows or doors of the premises herein leased,

or upon any exterior part of the building, any signs or symbols without the permission of the said lessor in writing first had and obtained.

The said lessee will not carry any stock of goods, or do anything in or about said premises which will in any way tend to increase the insurance rates on said premises.

It is expressly agreed that the lessee shall not sell, give away or otherwise dispose of intoxicating liquors upon said premises.

The lessee agrees to pay for all light, heat and water used in or charged against said premises during the term of this lease.

The lessee shall not make any alterations, additions, or improvements in said premises, without the consent of lessor in writing first had and obtained, and all alterations, additions and improvements which shall be made, shall be at the sole cost and expense of lessee and shall become the property of the said lessor and shall remain in and be surrendered with the premises as a part thereof at the termination of this lease, without disturbance, molestation or injury.

The lessor shall have the right to place and maintain "For Rent" signs in a conspicuous place on said premises for thirty (30) days prior to the expiration of this lease.

If any rents above reserved, or any part thereof shall be and remain unpaid when the same shall become due, or if lessee shall violate or default in any of the covenants, agreements, stipulations or conditions herein, then it shall be optional for the lessor

to declare this lease forfeited and the said terms ended, and to re-enter said premises, with or without process of law, using force as may be necessary to remove all persons or chattels therefrom, and the lessor shall not be liable for damage by reason of such re-entry or forfeiture; but notwithstanding such re-entry by the lessor the liability of the lessee for the rent provided for herein shall not be relinquished or extinguished for the balance of the term of this lease. And it is further agreed that the lessee will pay, in addition to the rentals and other sums agreed to be paid hereunder, such additional sum as the court may adjudge reasonable as attorney's fees in any suit or action instituted by the lessor to enforce the provisions of this lease, or the collection of the rentals due the lessor hereunder.

It is further understood and agreed that for convenience the terms "lessor" and "lessee" and verbs and pronouns in the singular number are uniformly used throughout this lease regardless of gender, number or fact of incorporation of the parties hereto.

It is further mutually covenanted and agreed between the parties hereto that no waiver by lessor of a breach by lessee of any covenants, agreement, stipulation or condition of this lease shall be construed to be a waiver of any succeeding breach of the same covenant, agreement, stipulation or condition or a breach of any other covenant, agreement, stipulation or condition; also that all the covenants, stipulations, conditions, and agreements herein contained shall extend to and be binding on

the heirs, executors, administrators, successors and assigns to the parties hereto.

This lease has been negotiated by Henry Broderick Inc.

In Witness Whereof the parties hereto have hereunto set their hands and seals the day and year in this instrument first above written.

Witnesses:

[Seal] SKINNER & EDDY CORPORATION

By M. H. KEIL

Attest:

Its-----

[Seal] MERCHANTS TRANSFER & STORAGE CO.,

By JAMES A. WALKER

Its Prest.

Attest:

SAM C. HORNER

Its Sec. Treas

EXHIBIT "A"

Possession:

It is hereby further understood and agreed that the premises are now occupied and that the lessor will endeavor to get possession of said premises by March 1, 1941, and will, if necessary, take legal steps to do so, but in no event shall lessee hold the lessor liable for any claim for loss or damage by reason of failure to get possession of said premises

and lessee agrees to waive all claim whatsoever for loss or compensation, excepting a proportional rebate of rent during the time possession of the premises may be withheld.

Tax Increase As Additional Rental:

As additional rental, the lessee shall pay fifty (50%) per cent. of all increases in taxes levied against said property during the term of the lease over and above the amount of the general taxes becoming due and payable February 15, 1941 known as the 1941 general taxes.

Interest On Lease Consideration:

It is agreed that if this lease shall still be in force and provided the same shall be in good standing by the prompt and faithful performance of all the covenants and agreements on the part of the lessee to be performed, and not otherwise, the Lessor will pay annually to the Lessee on the first day of February during the term hereof beginning with the first day of February 1942, interest accrued at the rate of five (5%) per cent. per annum from March 1, 1941 and thereafter the interest accrued at said rate from February first of each preceding year on any portion of said lease consideration of \$4,250.00 which has not theretofore been applied as rental as herein provided.

Option To Purchase:

As a further consideration for the execution of this lease, the Lessor does hereby grant to the Lessee an option to purchase the demised premises as follows:

If exercised on or before June 1, 1941, at a pur-

chase price of Seventy Thousand and no/100 (\$70,000.00) Dollars in cash.

If exercised on or before December 1, 1941, but after June 1, 1941, at a purchase price of Seventy-five Thousand and no/100 (\$75,000.00) Dollars in cash.

In event of exercise of option to purchase, title shall be shown by title insurance policy furnished by lessor to lessee in the amount of such purchase showing the property to be free and clear of all encumbrances excepting this lease and such as may be assumed by the purchaser (at purchaser's option) as a part of the aforesaid purchase price. Conveyance to be made by statutory warranty deed; rents, insurance, current taxes and interest on encumbrances, if any, are to be adjusted as of date deed is delivered.

J.A.W.

M.H.K.

S.C.H.

State of Washington,

County of King.—ss.

On this 6th day of February A. D. 1941, before me personally appeared M. H. Keil to me known to be the Treasurer and..... of Skinner & Eddy Corporation the corporation that executed the within and foregoing instrument, and acknowledged the same instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument and

that the seal affixed thereto is the corporate seal of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, the day and year first above written.

[Seal] M. D. ARUQUIST

Notary Public in and for the State of Washington,
residing at Seattle.

State of Washington,
County of King.—ss.

On this sixth day of February A. D. 1941, before me personally appeared James A. Walker to me known to be the President and Sam C. Horner to me known to be the Secretary-Treasurer of Merchants Transfer&Storage Co., the corporation that executed the within and foregoing instrument, and acknowledged the same instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument and that the seal affixed thereto is the corporate seal of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, the day and year first above written.

[Seal] HOMER E. BAILEY

Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed Aug. 4, 1943.

J. A. CLARK,

called as a witness on behalf of the respondents, having been first duly sworn, was examined and testified as follows:

I am the Seattle manager of Parrot & Co., food brokers. We are representatives of the U & I Sugar Company which has a sugar processing plant at Toppenish in the Yakima Valley. The production of sugar by the corporation is in excess of its storage facilities at the plant. About 400,000 bags of sugar are sold annually by the company on the west side of the mountains. About 150,000 pass through the Merchants Transfer & Storage Company warehouse. The warehouse facilities of the Merchants Transfer & Storage Co. in Seattle are now and have been for some time used by the company to distribute its product to the various grocery stores, retail centers and other customers in the Seattle area. The amount of sugar kept on hand at the warehouse of the Merchants Transfer & Storage Co. and in transit thereto average between 12,000 and 13,000 bags at all times, which is about the normal amount kept in the warehouse and in transit thereto. The new crop will start coming in about September 15th, which will mean that the storage facilities will have to be increased for the purpose of handling this new crop. The Merchants Transfer & Storage Company have rendered satisfactory service. Their place of business is convenient for the service of our various customers. The question of taking over the warehouse by the Gov-

(Testimony of J. A. Clark.)

ernment has been up for consideration two or three times in the past year and I have made an active canvass of warehouse conditions in Seattle. I do not believe that there is any other warehouse or storage company, which would have the space available for handling our business. The rationing situation requires the carrying of sugar in various size packages and the Interstate Commerce Commission are very strict. There are car loading limitations which [4] make it necessary for us to avail ourselves of warehouse storage and direct transportation facilities. The civilian population and the defense workers require the delivery of our sugar for their consumption. Unless we have adequate warehouse facilities and a delivery system comparable to that of the Merchants Transfer & Storage Company we cannot hope to deliver and supply the Seattle district with sugar.

The Court continued the hearing until August 5, 1943 at 9:15 A. M.

On August 5, 1943 at 9:15 A. M., the Court reconvened and the following proceedings were had:

A. E. HULLIN,

called as a witness on behalf of the respondents, having been first duly sworn, was examined and testified as follows:

I am with the Hullin Transfer Company. I am

(Testimony of A. E. Hullin.)

also the President of the Washington State Warehouse Men's Association and of the Federal Emergency Association of Seattle. I am in the warehouse business myself in Seattle and I am thoroughly familiar with the storage and warehouse business in the City and with the buildings suitable for public warehouses. I know of no building to which the Merchants Transfer & Storage Co. could move, if they were required to vacate their present building. No other warehouse in the city could accommodate and furnish sufficient warehouse space to the larger customers of the Merchants Transfer & Storage Co. Warehouses are classified by Government agencies as essential war industries. All of the warehouses in the City of Seattle belonging to the association, including the Merchants Transfer & Storage Co., have entered into an agreement with the Federal Emergency Warehouse Association, whereby they allocate and reserve 10% of their space for the use of the War Department.

M. M. HOUCK,

called as a witness on behalf of the respondents, having been first duly sworn, was examined and testified as follows:

I am the Assistant District Manager at Seattle of the Great Atlantic & Pacific Tea Co. and of Nakat Packing Company. A. & P. have eight large supermarkets in Seattle and one each at Renton

(Testimony of M. M. Houck.)

and Bremerton. The reserve stock for replenishing the stock of each individual store is warehoused [5] with the Merchants Transfer & Storage Company. They not only warehouse this reserve stock of all grocery items, but also distribute the replacement stock to the individual stores for us. A large part of our grocery items consists of canned and bottled fruits, vegetables and other products, all of which would be very seriously damaged or totally destroyed by freezing. We require a heated warehouse for the storage of our goods.

At the present time we have about 86,000 separate pieces warehoused at the Merchants building. The Merchants Transfer Co. deliver about 600 tons a month to our retail stores from the warehouse. About a year ago, when there was the first suggestion that the Army might take the Merchants building, I inquired about other warehouses that could take care of us. I do not know of any warehouse that could now take care of us. I do not know of any building to which the Merchants could move.

On two or three former occasions, the War Department have threatened to take over the warehouse. On these different occasions I have caused to be communicated to Senators Walgren and Bone the position we would be placed in with relation to supplying necessary food products to the civilian population and defense workers and on each occasion the movement of the War Department to take

(Testimony of M. M. Houck.)

over the warehouse has been suspended. The present action was started immediately after Congress adjourned.

On

Cross-Examination,

the witness testified as follows:

There is no extra space in our various markets where we could store the reserved stock, all of the available space in each market is in use. None of the markets have basements and there is no room in the back of the stores for the storage of reserved stock. The buildings were not constructed with the idea of storing the reserve stock in each market only only sufficient space is reserved in the back of the stores to unpack and handle the incoming merchandise, which is to go immediately upon the shelves for distribution. To operate economically we must maintain our reserve stock in a central warehouse from which it can be distributed to the various retail markets as the goods are sold and distributed by the individual stores. Much of our goods come in cartons; nearly all of the canned goods have labels, which would be very severely damaged unless they were stored in a dry [6] place. Consequently we cannot use sheds or temporary buildings. The buildings must be dry and in the wintertime must be heated.

LEON H. HERKENRATH,

called as witness on behalf of the respondents, having been first duly sworn, was examined and testified as follows:

I have been connected with and familiar with the warehouse business in Seattle for many years. I am now manager of a warehouse. For a number of years I was connected with the State of Washington Department of Public Service and assigned to the division which has jurisdiction over warehouses. I am familiar with the present situation in Seattle with regard to warehouse space. I know of no building to which the Merchants Transfer & Storage Company could move if they are required to give up their present building. I know of no warehouse that could take over the larger customers of the Merchants Transfer & Storage Company. It has been my observation and experience that iron and steel pipe fittings and castings are frequently stored out of doors and in temporary buildings.

SAM C. HORNER,

called as a witness on behalf of the respondents, having been first duly sworn, was examined and testified as follows:

I am the Secretary-Treasurer of the Merchants Transfer & Storage Company, a Washington corporation. We are conducting business as a public warehouse, licensed under the laws of the State of

(Testimony of Sam C. Horner.)

Washington, under the Uniform Warehouse Receipts Act. We are also under regulation by the Ordinances of the City of Seattle and operating under various agencies of the Federal Government, including the Customs Department, Internal Revenue, Office of Defense Transportation and the Interstate Commerce Commission. We also act as a bonded warehouse for the purpose of holding merchandise under Customs Regulations for the United States Government. Under an agreement made between the Warehouse Association and the United States Army, we have set aside 10% of our warehouse space to be held for the use of the Government. We are classed by the various agencies of the U. S. Government as an essential war industry.

[7]

We are leasing the property in question from Skinner & Eddy Corporation under a five year lease, which has been introduced in evidence. We formerly occupied a warehouse one block south and east of our present location. It was known as the Russell Warehouse. It had approximately 60,000 square feet of floor space. The ground floor had a floor loading capacity of 600 pounds per square foot. In 1941, the United States condemned the fee title of this building for the Port of Embarkation and we were forced to move. After investigating we leased the present warehouse. It was the only property available that could be adopted to our need. It had been used as an office building and for light storage by the Skinner & Eddy Corpora-

(Testimony of Sam C. Horner.)

tion Shipbuilding Company during the last war. Immediately prior to our occupancy it had been used for offices and for loft storage space. It cost us \$12,500.00 to fix up the building so that it was suitable for our purpose. This would equal \$2,500.00 for each of the five years of the term. The building has four stories and one-half basement. It is steam heated and is centrally located for the transaction of our line of business.

We have over 200 customers. We have many small customers and a number of large customers. Two of our principal customers are the Great Atlantic and Pacific Tea Co. and the U & I Sugar Co. Their *tonage* is coming into and going out of storage daily in carload lots. It consists of groceries and foodstuffs almost exclusively for the use of civilian population and defense workers. We also warehouse groceries and foodstuff for the Alaska trade of our customers. The warehouse is filled practically all of the time to its full capacity. We receive and distribute on the average of 150 tons per day. Our records are quite complete and show every ton of merchandise as received and sent out, either by the day or the month of the year.

I have thoroughly canvassed the City of Seattle looking for warehouse space, which would be available in the event we are required to move and I have used the offices of the leading real estate firms of the city for that purpose. I find that there is absolutely no space available in the City of Seattle which would accommodate our business and I fur-

(Testimony of Sam C. Horner.)

ther find that there is no space available in the City of Seattle or in other warehouses which are also taxed to capacity, which would be available for the accommodation of our larger customers. [8]

Sometime ago I canvassed the railroads to see if it would be possible to have them build a warehouse for us, which would be suitable for our use, upon their property and lease the same to us and I find that because of priorities and labor shortages that it was absolutely out of question to have a warehouse built for our accommodation.

The third and fourth floors of our building have a floor load capacity of 125 pounds to square foot. After working on the building we increased the floor load capacity to 175 pounds to square foot and the ground floor to 400 pounds to square foot. None of the space above the ground floor or basement would be suitable for the storage of iron pipe, castings or fittings or any other heavy product.

The Court continued the hearing to August 7, 1943, at 9:30 A. M.

We approve the foregoing narrative statement consisting of nine pages including this.

LEWIS L. STEDMAN

Attorneys for respondents

ROY D. ROBINSON

RUMMENS & GRIFFIN

Attorneys for Respondents

[Endorsed]: Filed Oct. 5, 1943. [9]

[Title of District Court and Cause.]

Be It Remembered, that heretofore and on, to-wit, August 7, 1943, at the hour of 9:30 A. M., the above entitled cause came on for continuation of hearing therein before the Honorable John C. Bowen, one of the judges in the above entitled court;

Ivan Merrick, Esq., and Ernest Falk, Esq., appearing for and on behalf of Petitioner;

Roy D. Robinson, Esq., and Tracy E. Griffin, Esq., appearing for and on behalf or respondent Merchants Transfer & Storage Company;

Lewis L. Stedman, Esq., appearing for and on behalf of respondent Skinner & Eddy Corporation;

Whereupon the following proceedings were had and done, to-wit: [1]

Seattle, Washington

August 7, 1943

9:30 A. M.

The Court: Are the parties and counsel ready to proceed with the further trial in the condemnation case against the Merchants Transfer and Storage Company?

Mr. Merrick: Petitioner is ready, your Honor.

* Page numbering appearing at foot of page of original Reporter's Transcript.

Mr. Griffin: Respondents are ready your Honor.

SAM C. HORNER,

previously sworn as a witness, called by and on behalf of the respondents, resumed the witness stand and further testified as follows:

Direct Examination (Continued)

By Mr. Griffin:

Q. I think at the close, before the recess, you were testifying about the contents of the warehouse property at this time? A. Yes, I was.

Mr. Merrick: For the purpose of the record, we have a reporter this morning. I wish the witness would state his name?

The Witness: Sam C. Horner.

The Court: Will you state your occupation, please?

The Witness: Secretary-Treasurer of the Merchants Transfer and Storage Company.

Mr. Merrick: Merchants Transfer and Storage Company is one of the respondents in this proceeding and Skinner and Eddy Corporation is also a party to this proceeding, is that correct? [3]

The Witness: Oh, yes.

Q. (By Mr. Griffin): Go ahead?

A. I was giving the figures on the goods on hand of the Atlantic Pacific Tea Company held in our warehouse in June for the retail outlets for civilian and war workers' consumption.

Do you want me to repeat the amount?

Q. What was the amount?

A. 86,934 packages. That includes case goods, all kinds of case goods, sugar and coffee and so forth.

(Testimony of Sam C. Horner.)

Q. Have you any idea of the tonnage involved in that? A. They averaged 45 pounds.

Q. The average package?

A. That is the average on them, yes, sir.

We deliver to the retail outlets with our own trucks—which we have a fleet of trucks, you know — and they work ninety percent hauling in and out of the warehouse. Our city business otherwise is not very great. We hauled out for Great A. and P. 1,006,400 pounds in June.

Q. Is that an average month?

A. Well, no. July will exceed that. The more people comes into the city, the more it takes to feed them.

We also delivered for Utah-Idaho Sugar Company. It went through our warehouse from February 1 to July 31, 9,291,580 pounds of sugar. This was also delivered by our own trucks.

We have 19 motor units in our fleet and they are kept busy hauling in and out of our warehouse with the other percentage of the business.

We have in our employ 31 truck drivers and helpers, [4] and seven office workers, and two of the company owners,—myself and Mr. Walker.

Q. Is the major portion of your warehousing and distribution food for the civilian population and armed forces? A. It is.

Q. What percentage of the floor area of that warehouse do you have in use?

A. We have the total area.

(Testimony of Sam C. Horner.)

Q. Is any of the storage specifically reserved now under agreement with some department of the United States government for government purposes?

A. The Federal Emergency Warehouse Corporation of Seattle.

Q. What percentage is that?

A. 10 percent.

Q. Now the merchandise that you have in there——

Mr. Merrick: Just a minute. The same question was asked in the last question. The petitioner objected to it on the ground it is incompetent, irrelevant and immaterial. The Court overruled the objection, to which an exception was taken and allowed.

Counsel for petitioner and the respondent have stipulated that it will not be necessary to take further objections or exceptions to this line of questioning, it being understood that the objection and exception goes to the whole of this line of questioning.

Mr. Griffin: That is correct.

The Court: The Court approves.

Mr. Griffin: Would you read the question, please?

(Whereupon the last question was read as recorded.) [5]

Q. (By Mr. Griffin): The merchandise that you have in there is for the civilian use and the armed forces? A. That is correct.

Q. Principally in foods?

(Testimony of Sam C. Horner.)

A. Principally in foods and materials.

Q. Do you know what your total tonnage is at the present time or what the average is?

A. Well, that fluctuates, you see, from day to day. I figure that we have on hand yesterday 10,000 tons of merchandise.

Q. What proportion of that is foodstuffs, would you say? A. I would say 90 percent.

Q. 90 percent? A. Yes.

Q. And of the other materials, what is the nature of those?

A. Well, we have wire which all goes to the ship-yards.

Q. Would what is known in the United States today as critical materials cover most of the other?

A. That is right.

Q. Now, does another branch of the United States government use your warehouse, to-wit the customs?

A. United States Customs.

Q. And just what use does the United States Customs make, and what proportion of the property do the Customs have?

A. The United States Customs has 9,000 feet in their own lockers. They store import goods waiting for the duty to be paid. We pay the Customs officer his time for taking out the material from these lockers and the Customs, of course, require certain restrictions on a building.

Our building has the A. D. T.—American District [6] Telegraph—burglar alarm. It also has supervision of the sprinkler system by the American Tele-

(Testimony of Sam C. Horner.)

graph. Should a sprinkler system go off, the fire department would know it instantly. And should someone break into the building, the American District Telegraph would know it instantly and would turn that call into the riot squad of the police department which has been done once or twice by mistakes of something going wrong with the system.

Q. Was the building especially altered to fit the use by the United States Customs?

A. Yes, sir.

Q. Altered by you, I mean, when you went in?

A. When we went in there. We couldn't take our lockers from the other building.

Q. There has been introduced in evidence in this cause petitioner's exhibit one. (indicating map). This is given as north. The portion in red here has been designated as the property sought to be taken; to-wit, the *the* warehouse in which you have your storage.

Will you orient yourself on that?

A. This includes the building and the vacant lot, —I mean the lot where we store our trucks, and our loading platform. Does it include the whole thing?

Mr. Griffin: I don't know. All I can say is that the testimony of the petitioner shows that the red includes the property being taken. Whether it includes the lot, I don't know.

Mr. Merrick: If the Court please, we have a map delineated in color as your Honor suggested the other day. If it is not interfering, it might be well to [7] introduce that for identification.

(Testimony of Sam C. Horner.)

Mr. Griffin: That is all right.

The Clerk: It will be marked petitioner's exhibit number 2.

Mr. Griffin: Perhaps by using this new map—Does the Court care to look at this red one? Counsel advised me that the red on this exhibit 2 corresponds with the red on exhibit 1 which is the property sought to be acquired.

The Court: Very well.

Q. (By Mr. Griffin): Now immediately to your east, I believe it is, there is a building in green on the map, exhibit 1, apparently in brown on this map exhibit 2?

The Court: You had better make sure for the record that all of the distinguishing colors on the map, there being a great number of them, are accurately described for fear that somebody might be put off of the track in the future.

Mr. Griffin: There is a legend on here with it, your Honor.

The Court: Oh; I see the legend.

Q. (By Mr. Griffin): This building described in green—Goodrich Rubber Company building—is that immediately east of your plant? A. East.

Q. What was that building, was that a warehouse building?

A. That was a warehouse building. Also it housed Goodrich rubber on the upper floors.

Q. But it was a warehouse building?

A. Yes. [8]

Q. That was taken by the government was it?

(Testimony of Sam C. Horner.)

A. It was.

Q. What is it being used for?

A. I couldn't tell you. There is no storage in it.

Q. No storage in it.

Q. (By the Court): Is the building suitable for storage?

A. It is one of the best warehouse storage buildings in the city of Seattle.

Q. How far is it from your building?

A. 100 feet.

Q. Was it ever used for that purpose?

A. Oh, yes. I have stored sugar 20 sacks high in it on the first floor.

Q. (By Mr. Griffin): Do you recall about when the government took over that building?

A. It was along in I think October.

Q. 1942? A. Yes.

Q. It hasn't been used for storage at all?

A. Not to my knowledge.

Q. I was of the impression it was being altered into an office building. Do you have any information on that?

A. You see lumber going in it. It looks like it is to that effect.

Q. Now the Goodrich building was built as a warehouse building and used for that purpose ever since was it?

Mr. Merriek: If the Court please, we wish to place an objection to any questions as to what the government is using other buildings for in the vicinity as being incompetent and immaterial. [9]

(Testimony of Sam C. Horner.)

The Court: The objection is overruled.

Q. (By Mr. Griffin): What is the carrying load of your building as you reconstructed for warehouse purposed on the upper floors?

A. The upper floor, the fourth floor is 125 pounds to the square foot. The third floor is 125 pounds to the square foot. The second floor 170 pounds to the square foot. And the first floor, we have braced those very securely. We can put 400 pounds,—we have put 400 pounds to the square foot after our reconstruction.

The Court: How does the size of this adjoining 100 foot away building, already in possession of the government, compare with the size of your building?

The Witness: I think it is 10,000 square feet less than our building. I think it is around 90,000 square feet in the building, if my figures are correct. I never measured it off.

The Court: The square footage of your building is about 100,000 square feet, is that it?

The Witness: 97,200.

Q. (By Mr. Griffin): Were you advised by the War Department, the real estate branch, through some designated officer about September 6th of last year that your building was required immediately for war purposes? A. Yes.

Q. It was not taken over was it? A. No.

Mr. Merrick: Just a minute. If the advise is in writing, if it was in the form of a letter I would like to have it introduced. [10]

(Testimony of Sam C. Horner.)

Mr. Griffin: Will you mark this letter for identification please?

The Clerk: It will be respondent's Exhibit A-2.

(Letter marked as respondent's A-2 for identification.)

Q. (By Mr. Griffin): Handing you respondent's A-2 for identification, is this a communication received by you?

A. This is a copy of it, by the way. The original is in our files.

Q. This is a copy? A. That is a copy.

Mr. Merrick: If that corresponds to this copy, I would have no objection to it. (letters compared.)

Mr. Griffin: I offer in evidence exhibit 2 for identification.

The Court: It is admitted.

(Respondent's exhibit A-2 received in evidence.)

(Testimony of Sam C. Horner.)

RESPONDENT'S EXHIBIT NO. A-2

Merchants Transfer & Storage Co., Seattle

WAR DEPARTMENT

Real Estate Branch

North Pacific Division, U. S. Army Engineers

Lloyd Building, Seattle, Washington.

Refer to File No. 5 REB 601.53

September 6, 1942.

Merchants Transfer & Warehouse Company,

24 West Connecticut Street,

Seattle, Washington.

Attention: Mr. Sam C. Horner.

Dear Sir:

We have been requested by the Port of Embarkation, United States Army, to make available for their use all of the building now occupied by you and located at 24 West Connecticut Street, Seattle. It is our understanding that this building is owned in fee by Skinner & Eddy of Seattle, and we are, therefore, forwarding a copy of this letter for their attention.

It will be necessary that this property be turned over for the Army's use just as early as possible, and it is hoped that it can be made available within thirty days.

With reference to the rental which we will be able to pay for the property, we will have the property appraised immediately, so it will take some

(Testimony of Sam C. Horner.)

time to complete our appraisals and have them approved. We will be able to pay as rental for the use of the premises a reasonable rental value as shown by our appraisal.

We will appreciate your cooperation in making this property available for Army use as early as possible.

Yours very truly,

JOSEF DIAMOND,

Major, J.A.G.D.

Asst. Division Real Estate Director.

cc—Skinner & Eddy Corp.,

Skinner Bldg.,

Seattle, Washington.

[Endorsed]: Filed 8/7/43.

Q. (By Mr. Griffin): Thereafter did either the same or some other branch of the government make a demand requiring the building for immediate use?

A. In January of this year I was called to the real estate office in Seattle by a captain up from San Francisco.

Q. You said a real estate office; what did you mean?

A. The War.

Mr. Merrick: A real estate office of the War Department?

The Witness: Of the War Department, yes.

The Court: Is that in San Francisco?

(Testimony of Sam C. Horner.)

The Witness: No. This captain came up from San [11] Francisco and told me. I don't recollect just what date it was but it was some time in January.

R. C. Erskine around that time looked the building over. He is a real estate man. We wrote a letter to Mr. Erskine—I have a copy of it here—giving him facts about the building.

Q. (By Mr. Griffin): Were any other formal demands made until this proceeding?

A. No, no.

Q. Is there any available warehouse space in the city of Seattle at the present time to which you could move your goods now in storage?

A. There is not.

Q. If this property,—or rather, your lease is taken, what will you be required to do then?

A. Nothing left to do only liquidate.

Q. Liquidate the business?

A. That is right.

Q. How long a period of time will that require?

A. At least 12 months.

Q. Are all the goods in your warehouse under warehouse receipts? A. They are.

Q. Uniform warehouse negotiable receipts?

A. Some of them negotiable and others are non-negotiable. They only require negotiable receipts when they borrow money at the banks, and the bank accepts that negotiable form from us, under our bond with the state, and our licenses, you see.

Q. Is there available warehouse space or facili-

(Testimony of Sam C. Horner.)

ties in [12] Seattle at the present time for your larger customers?

A. No. They couldn't possibly get a large customer in any building that I know of. There is no room. I have surveyed the town myself.

Q. Have you also made a survey as to whether or not it would be possible to construct,—that is for you or someone in your behalf, other than the government, to construct warehouse facilities in Seattle at the present time?

A. I have talked to several people about construction. In fact, I went to the railroad in January and asked them if they would construct a building. I showed them the plot that I would like to have, and they said absolutely not.

Q. Because you mentioned that,—although I have covered it before, but we have a reporter now. You went to the railroad because the railroad owns the principle accessible properties for warehouse purposes?

A. That is right.

Q. Do you know whether or not the other warehouses in Seattle other than this Goodrich warehouse or warehouses owned by the government,—but I mean public warehouses are filled to capacity at the present time?

A. They are.

Mr. Merrick: If the Court please, my objection goes to this line of testimony about the availability of other space in the city of Seattle.

The Court: Is that agreeable to opposing counsel?

Mr. Griffin: Yes.

The Court: That is approved by the Court.

(Testimony of Sam C. Horner.)

Q. (By Mr. Griffin): Under the circumstances would the other public warehouses in Seattle be able to take over your [13] business,—I mean handle the business of your customers?

A. Absolutely not. The president of the Association of the state of Washington told me the other day,—he says, “Well, what are you going to do with it?” I said, “I don’t know.” He says, “There is no place in Seattle to put it.”

No warehouse can absorb any of it from the fact that they have allotted 10 percent to the federal government, War Department, and they have *go* to save that room.

Q. Now, if there was suitable warehouse space available, and within a reasonable distance from your plant, how long would it reasonably take assuming that the building was ready and fully fitted, how long would it take under present conditions in Seattle for you to move your entire stock to the other warehouse, considering business conditions as you move,—of merchandise coming in and going out?

A. It would take ninety days. That would be the best we could do it. It did the last time, and we didn’t have as much stock.

Q. The last time you refer to is the other government condemnation?

A. That is right. And we moved a block and a half.

Q. That is what I was going to ask you. You moved a block and a half?

(Testimony of Sam C. Horner.)

The Court: Did you in the other case put forth all the effort possible to move quickly?

The Witness: We did. We moved nights and Sundays. We took care of our business in the day-time and moved [14] what we possibly could. We paid overtime on more than 75 percent of the move to the union drivers. They worked three or four hours nights and all day Saturdays and Sundays.

The Court: Was it necessary to use the whole day time and night time for moving rather than the ordinary day work time?

The Witness: Yes, your Honor. In the day time we had all that our trucks could do to take care of the current every-day business. We had to work them overtime.

The Court: Were they so used to prevent losses which otherwise would have occurred?

The Witness: That is right. We would have lost business. We had to take care of it.

Q. (By Mr. Griffin): Your move the other time was about 6,000 tons wasn't it?

A. In the neighborhood of 6,000 tons, yes.

Q. Now you have over 10,500?

A. Something like that. It fluctuates, of course.

Q. Is this building that you are now in suitable for the storage of metals?

A. No, it is not.

Mr. Griffin: That is all.

The Court: The petitioner may inquire.

(Testimony of Sam C. Horner.)

Cross Examination

By Mr. Merrick:

Q. You handled about 550 tons of merchandise with A and P during the month of June, 1943, is that correct? [15]

A. That is correct.

Q. But you didn't have 550 tons of stuff on hand at all times or did you?

A. Oh, yes, we had more than that. That is just what we delivered to their retail stores from our warehouse.

Q. And you delivered and handled during six months, from February 1 to July 31, about 4145 tons of sugar,—that is over a six months period, that is correct is it not?

A. That is right.

Q. You have some 700 tons of sugar a month.

Now, the property that belonged to the United States government, you wouldn't have to worry about moving that under this condemnation would you?

A. We would have to move it. We are under bond to the federal government.

Q. You haven't any place to move it to you testified?

A. We would have to notify the United States Customs what to do with it.

Q. Assuming that the Court orders possession in the War Department, you would want to get out the private stuff like the food belonging to the A. and P. and the sugar belonging to the sugar company, and then you would have a lot of wire. What

(Testimony of Sam C. Horner.)

tonnage do you have in there in the nature of wire or metal goods or heavy goods?

A. Well, I never figured that up before I left.

Q. Well, is it over half?

A. It occupies 1,000 square feet.

Q. On the first floor?

A. On the basement floor.

Q. You are using four floors and the basement floor? [16] A. Yes.

Q. What do you have on the first floor?

A. Foodstuffs.

Q. By the way, the rated carrying capacity of your building is about 7,000 tons is it not?

A. 7,000 tons?

Q. 7,000 tons is the rated carrying capacity of the building?

A. It was until we braced up the lower floors.

Q. And instead of loading the lower floor 225 pounds per square foot you are now loading it 400 pounds? A. That is right.

Q. What do you have on the first floor?

A. Sugar and canned goods.

Q. You say you have 31 trucks?

A. 19.

Q. 19 trucks, and 31 truck drivers and helpers?

A. And we also had,—last month we had 1,022 hours of extra labor.

Q. What is the biggest tonnage you handled out of there in any day, can you tell? A. 120 tons.

Q. That is the most that you have ever handled in any day?

(Testimony of Sam C. Horner.)

A. That is about an average day, you see.

Q. I am asking you the biggest, the maximum handling capacity?

A. I could handle 250 tons out of there in a day.

Q. When you moved before, of course, you had in mind keeping the business going as nearly normal as possible did you not? A. Yes, sir. [17]

Q. And that naturally slowed up the moving. If you had nothing to do but move, you could have done it much quicker than 90 days, couldn't you?

A. Oh, if I had nothing to do but move, we could move lots quicker.

Mr. Merrick: I believe that is all.

Redirect Examination

By Mr. Griffin:

Q. And if you had some place to move?

A. If we had some place to move.

Q. And were not under liability to your customers? A. That is right.

Q. That is, if you were moving out on the city dump, like potatoes?

A. We could put our whole fleet on it, if we had no other business.

Mr. Griffin: That is all.

The Court: You may be excused from the stand. Call your next witness.

(Witness excused.)

A. L. PLOYART,

called as a witness on behalf of the respondents, having been first previously sworn, was examined and testified as follows:

Direct Examintaion

By Mr. Griffin:

Q. Will you state your name, please?

A. A. L. Ployart.

Q. What is your business? [18]

A. Industrial real estate.

Q. How long have you been engaged in that business in Seattle? A. About 12 years.

Q. And are you familiar with the present condition and conditions of the past few months or years of commercial property in Seattle?

A. Yes, sir. The chief source of my revenue is the leasing of warehouses.

Q. Will you state to the Court the warehouse situation as to availability of warehouses or space is and has been in Seattle for the past two years?

Mr. Merrick: I object to the question on the grounds it is outside of the issues and incompetent.

The Court: The present situation on that issue is if any such issue is now before the Court rather than the last two years. I would say the present.

Mr. Griffin: All right; the present.

The Court: So modified, the objection is overruled.

A. You want the present situation?

Q. (By Mr. Griffin): Yes.

(Testimony of A. L. Ployart.)

A. Well, there isn't any practical warehouse space available,—that is, for the operation of an industry like a warehouse company.

Q. What is required in the operation of a public warehouse such as the Merchants as to facilities?

Mr. Merrick: The same objection, your Honor.

The Court: Overruled.

A. Accessibility, rail facilities, and I suppose to a certain extent the floor load, floor capacity of the building, [19] convenience to the distributing points, protection as far as fire and theft is concerned.

Q. (By Mr. Griffin): Do you know of any accessible building in Seattle at the present time in which the Merchants Storage materials could be moved if they had to be moved today?

A. No, sir. Some time ago I leased the Merchants part of another building to take some of their overflow. It is rather difficult to find a practical operative situation even for that. I understand it was taken only out of consideration for his customers as an obligation to them.

Mr. Griffin: I think you may inquire.

Mr. Merrick: That is all.

The Court: You may step down.

(Witness excused.)

PAUL NELS CARLSON,

called as a witness on behalf of the respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Griffin:

Q. State your name please?

A. Paul Nels Carlson.

Q. Your occupation, Mr. Carlson?

A. Contractor.

Q. In Seattle and King County?

A. Yes.

Q. How long have you been engaged in that business? A. 31 years.

Q. You are under what firm name? [20]

A. Teufel and Carlson.

Q. Not going into any details, you have had some of the large construction projects in and about this state? A. Yes.

Q. Are you familiar with the construction of warehouses for commercial use? A. Yes.

Q. Are materials available at the present time for such construction through anyone other than the government or its agencies?

Mr. Merrick: I object on the ground it is going outside of the issues, incompetent, irrelevant and immaterial.

The Court: Mr. Reporter, will you read the question?

(Whereupon the last question was read as recorded.)

(Testimony of Paul Nels Carlson.)

Mr. Merrick: And on the further ground it calls for a legal conclusion.

The Court: The objection is overruled.

A. Not without a directive from the War Production Board.

Q. (By Mr. Griffin): If there was a directive, with the priorities available, then still the materials would have to be found wouldn't they?

A. Priorities are not obtainable.

Q. Assume, however, that the material was available and that the labor was available,—and is there some assumption there as to labor? A. Yes.

Q. But assuming that both materials and labor were available how long in your opinion would it take or be required to [21] construct a suitable commercial warehouse building at the present time with a load capacity of let us say 10,500 tons?

A. Four to five months.

Q. That is assuming a site was had and you could start construction today? A. Yes.

Mr. Griffin: You may inquire.

Mr. Merrick: No questions.

The Court: You may be excused.

(Witness excused.)

The Court: Call the next witness.

Mr. Griffin: Respondent rests.

The Court: Any further testimony on the part of the petitioner?

Mr. Merrick: We have some rebuttal testimony. First, your Honor, I move to strike all of the testi-

mony of the Merchants Transfer and Storage Company on the ground it is incompetent, irrelevant and immaterial and outside of the issues of this case.

The Court: The motion is denied.

Mr. Merrick: I will call Major Meyers for rebuttal.

Mr. Falk: May it please the Court, the government is calling Major Meyers without waiving its position previously asserted in court with which your Honor is familiar, namely that the government is under the statutes entitled to immediate possession and that the only matter for determination by your Honor is, as well stated in that Peterman Manufacturing case, whether or not there is [22] an abuse in our discretion.

The government is not waiving the objections or any portion thereof in any portion of the case.

The Court: You may be sworn.

HARRY T. MEYERS,

called as a witness in rebuttal, on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Falk:

Q. Will you state your name, please?

A. Harry T. Meyers.

Q. And you are in the United States Army, attached to the Engineers?

A. Yes, sir.

(Testimony of Harry T. Meyers.)

Q. Showing you a map which has been identified as petitioner's exhibit 2, I will ask you to state whether or not you are familiar with that map?

A. Yes, sir.

Q. Was that prepared either by you *are* under your supervision?

A. It was prepared under my supervision.

Q. And upon the map there are six different colors. Does the legend in the lower center portion of the map correctly state the colors and the purposes? A. Yes, sir.

Q. For which they are used? A. Yes.

Q. And is that map which is a true and accurate depiction of the situation at the Seattle Port of Embarkation? [23] A. Yes, sir.

Mr. Falk: The government offers petitioner's exhibit number 2 in evidence.

Mr. Stedman: If the Court please, I think that counsel should show as of what date the map speaks.

Mr. Falk: I think that point is well taken.

Q. (By Mr. Falk): Major, as of what date does the map speak?

A. In so far as the property ownerships shown on there?

Q. Yes, that is correct. A. As of today.

Q. Is it a correct summary to state that all of the property except that depicted in red is either in the possession of the United States or that satisfactory voluntary arrangements have been made that the possession thereof be made to the United States?

Mr. Stedman: I object to that if the Court

(Testimony of Harry T. Meyers.)

please, because it speaks contrary to conclusion, the legend showing that certain of the properties are under negotiation.

Mr. Griffin: And of course that would not be the best evidence.

The Court: That objection is overruled.

Mr. Griffin: I object to it on the ground it is not the best evidence, also a conclusion.

The Court: Overruled.

Mr. Falk. The government repeats its offer in evidence of the map, your Honor.

The Court: Any objection?

Mr. Griffin: I object to it now as not properly identified as to legends. [24]

Mr. Stedman: I object to it if the court please on the ground that the map itself contradicts previous evidence of the government.

The Court: Gentlemen, I think the map is just merely explanatory in its purpose and is meant to enlarge upon the detail shown by the previous exhibit which was petitioner's exhibit 1, as I recall. And I think that while there might be some possible inaccuracy of detail that its main purpose is merely to show an enlarged scale of the information shown on the previous map.

Mr. Stedman: If that is the purpose, I have no objection.

The Court: From a practical standpoint I can see no harm, and I can see some benefit. The objection is overruled. The petitioner's exhibit 2 is now received in evidence.

(Petitioner's exhibit 2 received in evidence.)

(Testimony of Harry T. Meyers.)

Q. (By Mr. Falk) Major, how long have you been stationed at the Seattle Port of Embarkation?

A. Since January, 1941, the date of acquisition of the property.

Q. That was the acquisition of the old Pacific Steamship terminals?

A. The acquisition of the old Pacific Steamship terminals.

Q. That is indicated in what manner upon the map, petitioner's exhibit 2?

A. As green, and designated as acquired January, 1941, from Pacific Steamship Terminal. [25]

Q. In the course of your official duties have you had any connection whatsoever with the planning of the development of the expansion of the Port?

A. Well, I might say that I was the first person representing the government to establish an office on the property for the purpose of taking over the property and reconditioning it and renovating it for the occupancy of the War Department.

The Court: Which property is that?

The Witness: Pacific Steamship Terminal, in January, 1941.

Q. (By Mr. Falk) On January 1, 1941, what was the character of the Port of Seattle Port of Embarkation as to its rating as a Port?

A. It was then a primary,—or a sub port of the primary port in San Francisco.

Q. And was that status of a sub port changed at any time thereafter?

(Testimony of Harry T. Meyers.)

A. It was later made a primary port of embarkation.

Q. How many primary ports of embarkation are there in the United States?

A. That I can not give an accurate number.

Q. Are there any others; San Francisco is also a primary port is it not?

A. That is correct.

Q. And New York? A. That is correct.

Q. Are there any sub ports under the jurisdiction of the Seattle office, or Seattle area?

A. At the present time we have three. [26]

Q. Now you state that on January 1, the property which was formerly owned *an* occupied by the Pacific Steamship Terminal was taken over by the United States of America?

A. That is correct.

Q. Was any other property subsequently,—or what property was next acquired after that and when was it so acquired?

A. The next piece of property was designated as the Russel property, which was acquired in April, 1941.

Q. And that is the property that was formerly occupied by the Merchants, or a portion of which was occupied by the Merchants Transfer as lessee?

A. A portion of it was, yes.

Q. How was the Merchants Transfer and Storage described or identified on the map, by what color as the Russel property? A. Blue.

Q. And what was the next addition to the port facilities?

(Testimony of Harry T. Meyers.)

A. Well, the next addition as a government purchase was the so-called A. M. Castle property which was acquired in April, 1942.

Q. What did that property consist of generally?

A. Well, generally the old A. M. Castle steel shed which is now designated as our building 8. And a one story frame building along Connecticut Street which is now designated as our building 11. A gasoline service station formerly occupied by Kohl and Kohl. It is *one* the corner of Connecticut street and Alaskan Way. And also another building on the north side of Connecticut street now designated as our building 13, formerly the A. M. Castle office building. [27]

Mr. Falk: I might state to the Court that that A. M. Castle property is incorporated in an action in the records of this Court, of which I believe the Court will take judicial notice.

Q. (By Mr. Falk) What was the next property acquired in the expansion of the port?

A. The next piece of government owned property,—I can't say that it is government owned at this time, but it is under negotiation for ownership from the Port of Seattle.

Q. Is the government in possession of that property that you refer to that is under negotiation?

A. They are.

Q. And when you refer to negotiation it is simply a matter of determination of value?

A. That is correct. I say the War Department is now constructing and completing a pier and tran-

(Testimony of Harry T. Meyers.)

sit shed on this property from War Department funds. The land is the portion under negotiation.

Q. Does that pier show upon the map?

A. The pier is designated on the map as pier "D".

Q. And that is shown as what color?

A. Green.

Q. What is the next property?

A. Well, there is a piece of Port of Seattle property,—that is the extent of the government owned property. They are leased properties.

Q. Would you tell what is government leased property as shown in Seattle?

A. That is shown in orange and designated as pier "E".

Q. Is there anything under construction on pier "E"? [28]

A. There is a dock and pier sheds being constructed by the Port of Seattle.

Q. Do I understand then that there is under construction at the present time a pier designated as pier "D" and another pier designated as pier "E"? A. That is correct.

Q. When is it anticipated that pier "D" will be completed, the construction?

A. Pier "D" will be completed some time during the month of August. It is now being occupied by divisions of the Port of Embarkation,—portions of it.

Q. And you anticipate that during the month of August, 1943, that construction will be completed

(Testimony of Harry T. Meyers.)

and it will be ready to be placed in use as a major pier? A. That is correct.

Q. Terminal? A. Yes.

Q. Has the volume of traffic handled through the Seattle Port of Embarkation materially increased since January 1, 1942?

A. It has increased considerably.

Q. Has it increased since January 1, 1943?

A. It has.

Q. Do you anticipate whether there will be any increase during the coming months?

A. It could reasonably be expected.

Q. In connection with the cargo,—the volume of traffic which you reasonably anticipate will be handled covering both cargo and passenger traffic, will the government require this space designated on the map in red, and being the property described in the petition in condemnation [29] herein?

A. Well, it is now required for our present Port of Embarkation operation.

Q. And how soon will you need possession thereof?

A. Well, that could be answered immediately. Because it is now holding up moves at the Port of Embarkation that are necessary to accomplish the mission of the Port of Embarkation.

Q. If the army was not in possession of that property on August 31, 1943, would in your opinion the successful prosecution of the war be impeded or impaired? A. It would be impaired.

(Testimony of Harry T. Meyers.)

Q. Materially or slightly?

A. Well, it would be impaired materially in my opinion.

Q. (By Mr. Falk) Major, during the testimony this morning there was a reference to the Goodrich building. Is that building shown upon the map? A. Yes; it is in brown.

Q. And is that building being utilized at the present time? A. It is.

Q. For purposes other than storage,—or for what purpose is it being used? [30]

A. Well, at the present time it is being used for offices on the first floor. The upper floors are in the process of being remodeled.

The Court: For what purpose?

The Witness: For office space.

The Court: You are converting warehouse space into office space, is that right?

The Witness: We are converting the building into office space.

The Court: The building was used as storage. Did the government ever use it for warehouse space?

The Witness: They did for transit storage.

Q. (By Mr. Falk) During the period that you have been stationed in Seattle, have you had anything to do with the planning of the development of the Port of Embarkation?

A. I am now a member of the Planning Board.

Q. How long have you been such a member?

A. Just recently.

(Testimony of Harry T. Meyers.)

Q. In connection with your duties at the Seattle Port of Embarkation, do you know whether or not a comprehensive plan has been made for the development of the entire area depicted on the map?

A. It has.

Q. In your opinion, is the purpose for which each of those facilities is being developed necessary in order to have an integrated port?

A. In my opinion, yes.

Q. Referring to the map, Major, and to your knowledge of the local situation, within the area embraced by the [31] various colors, is there any occupancy other than that of the United States of America and the Merchants Transfer and Storage?

A. Not within the area covered by the plan.

Q. So that the present government buildings or present construction occupies the entire area except,—and completely surrounds the Merchants Transfer and Storage Company's facilities?

A. That is correct.

Q. For security reasons, is there any value to having this Merchants Transfer and Storage property brought into the immediate possession of the United States of America?

A. There is,—definitely.

Q. Would you explain that to the Court, please.

A. Well, for two reasons primarily; one from the sabotage angle which is now planned and being put into effect that the entire government owned reservation be surrounded with a fenced enclosure.

(Testimony of Harry T. Meyers.)

There is now constructed and completed and will soon be put in use a gate-house immediately north of the administration building, and building 34 at which it is planned to divert all pedestrian traffic and employees through turnstiles at this gate-house so that the only pedestrian entrance to the properties will be through guarded turnstiles.

There will be other truck entrances, for entrances to the piers, that will be under rigid military guard.

At the present time the location of other than government agencies on this property constitutes a definite fire hazard. It so happens that in addition to [32] my other duties I am Port Fire Marshal and responsible for the fire protection. This building and property is located in the center of the Port of Embarkation installation and is not under our control for supervision of fire hazards. We have no control over the types of supplies that are put into this property that may constitute fire hazards. It has already been shown that it is a fire hazard.

In fact, since we have been on the property they have had fires in the building. One of them occurred in the sugar storage area, I understand. I was there and witnessed the fire department in action in putting out the fire.

The building is located immediately adjoining a government owned building and adjacent to the pier aprons of the new pier "D", approximately less than 50 to 75 feet from the wood constructed pier apron in front of the new pier "D" which

(Testimony of Harry T. Meyers.)

would definitely be a hazard to the pier and cargo stored in adjoining area in the event a serious fire occurred in this structure now occupied by the Merchants Transfer.

The government has a permit from the city to use the western end of Connecticut street. It has been protected by a gate and a fence which has been recently removed for the purpose of construction in pier "D". It is desired that upon acquisition of control of the entire properties that this fence be placed along Alaska Way to cut off the whole of Connecticut street west of Alaskan Way. So that the property within that area could be secured and under guard upon the west side of Alaskan [33] Way.

Q. Major, are you familiar with the uses to which it is proposed that the United States of America will put the subject property, being the property being taken,—the use of which is being taken in this condemnation action?

A. I am.

Q. What are generally the proposed uses to which it will be put?

A. Well, generally at the present time all uses of structures within the port area are subject to change to meet the mission of the port. At the present time it is planned that the first floor of this building will be used for certain offices of the divisions occupying the structure and ships stores; the majority of the first being used for ships stores.

(Testimony of Harry T. Meyers.)

Q. Where are those ships stores now being stored?

A. They are now being stored in building number 7 which is at the corner of South Alaskan Way and Massachusetts Street on the northwest corner.

Q. Which property was that when it was under private ownership?

A. It was a portion of the property under Pacific Steamship Terminal.

Q. Do you need that space now being used for ships stores for any other purpose?

A. That space now being occupied, building 7, for ships stores, is needed for transit storage for which the rest of the building is being used.

Q. Just what do you mean by transit storage?

[34]

A. That is the receipt of freight and cargo items that may be received in carload lots with freight designated for several destinations overseas. It may be received by motor freight. It may be received by government transportation. The freight is unloaded in this warehouse building, broken down into cargo designated for certain destinations and held until it is necessary to be placed on the pier sheds or docks for loading aboard ships.

Q. And do I correctly understand that the increased volume of traffic due to the war developments in the Pacific requires that this space in building number 7, which has been used for ships stores, requires that it be used for transit stores?

A. That is correct.

(Testimony of Harry T. Meyers.)

Q. And that other available space will be needed for ships stores? A. That is correct.

Q. Major, you started to enumerate the purposes for which the subject property would be used. You mentioned just the——

A. It is planned at the present time that the floors above and in the basement of the structure be used for storage of supplies and materials and equipment incident to the operations of the marine repair shop which is charged with the responsibility of repairing transports and ships while in port.

Q. Will you explain how those repairs are carried on, particularly with reference to loading operations?

A. The main mission of the Port is, of course, to ship cargo and troops and equipment. The success of that mission [35] depends upon how rapid and how efficient those movements,—vessel movements can be made, in reducing the turn-around time of vessels between overseas ports and this port

In order to reduce that turn-around time, the Port has established a marine repair shop within the property in order that repairs can be accomplished on ships that do not require dry docking while being berthed at the Port piers.

Those repairs are accomplished while cargo is being discharged and loaded in many instances. It is necessary in accomplishing these repairs that the supplies, materials and equipment they need for the repairs be immediately available.

(Testimony of Harry T. Meyers.)

There is also a small drydock being installed on the north side of pier "C" designated on the map or immediately west of the marine repair shop, so that repairs on smaller vessels can be accomplished there while being drydocked.

The Court: May I ask him a question?

Mr. Falk: Surely.

Q. (By the Court) What dock in Seattle at which many ships or any considerable number of ships berth is there maintained a storage warehouse apart from the dock to warehouse ships stores and repair parts for ships; do you know of any place like that in Seattle where the situation is comparable to the situation the government seeks to bring about by reason of this condemnation?

A. Not any commercial piers, no, sir.

Q. Name some outstanding pier in Seattle where a great number [36] of vessels regularly berth and where repairs are made upon the ships instead of sending them to drydock. Do you know of any such outstanding pier in Seattle?

A. Well, pier 40 and 41, a navy installation.

Q. Well, before the navy installed theirs, before the navy took possession by condemnation proceedings there, was there any arrangement for warehousing and storage of ships parts, repair parts or ships stores apart from the docks themselves?

A. I am not familiar with it.

Q. Can you name any large pier in Seattle or any pier in Seattle where as a part of the enterprise of servicing the ships that berth there, there

(Testimony of Harry T. Meyers.)

is maintained apart from the dock facilities any warehousing or storage facilities to especially accommodate ship repair parts and ships stores?

A. Well, I am not familiar with any other piers except the government-owned.

Q. Do you know anything about the Alaska piers? A. No, sir, I don't.

Q. Or the East Waterway warehouse?

A. Ames Terminal.

Q. Ames Terminal?

A. Ames Terminal have facilities there.

Q. Is it separate from the dock and storage facilities?

A. They have separate buildings that I understand were used for repair purposes.

Q. I wonder how the Alaska Steamship Company manages current and small repair jobs on ships berthing at their piers, do you know? [37]

A. I don't know.

Q. Do you know whether or not they possibly carry in storage on the docks repair parts for the ships? A. I do not.

Q. Do you know whether possibly with such facilities as they have at the dock they may make temporary or small repairs aboard ship while the ships berth at the piers instead of sending ships to drydock?

A. They may make them right there. As I say, it is quite possible they could make them.

Q. Isn't it possible to store on the docks under

(Testimony of Harry T. Meyers.)

the dock sheds, where the ships berth, ordinary ships stores without having a warehouse for that?

A. It is possible. But it is not the practice at a port of embarkation to store anything but in-transit storage in pier sheds. The reason for that is that the mission of the pier and cargo operation has to remain elastic so that in the event of emergency movements or shipments the cargo necessary for that shipment or shipments might be accommodated on the pier or pier sheds or immediately in open storage in front of the pier sheds.

Q. (By Mr. Falk) Major, had you finished covering the various uses to which this new building would be put?

A. Well, in general that is the two main uses to which the building will be put.

Now, the types of supplies, I might elaborate on the types of supplies. It does not necessarily mean that the entire upper floors are going to be full of fittings or pipe or steel. There are thousands of types of supplies necessary for ships' repairs.

[38]

The weights vary from gaskets and packing on up to steel plate. There are electrical supplies, various types of communication supplies. And the purposes for which these floors will be used for storage will be controlled to the supplies for which the floors are suitable and designed for.

Q. Will the materials stored in the building be the type which could be stored outside, so-called open storage?

(Testimony of Harry T. Meyers.)

A. Generally the supplies stored under coverage are those which would be damaged by the weather or deteriorated rapidly under weather conditions.

Q. Major, in the area covered by the Seattle Port of Embarkation as depicted on petitioner's exhibit 2, is there any vacant space for which plans have not been made? A. There is not.

Q. During the period you have been with the Port of Embarkation have you had any contact with Mr. Horner or any other representative of the Merchants Transfer and Storage Company with respect to this space?

A. Well, in June, 1942, it was determined by the Commanding Officer of the Port that properties,—additional properties would be required. And about that time in June we made a first request to the real estate branch of the War Department by accomplishing a form for the acquisition of the properties which the Merchants Transfer Company was a part of.

At that time Colonel Marshburn, who was then the transportation officer and is now the Port Quartermaster, and I went through the building with Mr. Horner who very graciously showed us through and cooperated with us very [39] well in letting us establish an air raid shelter within the building and first aid facilities.

At that time Colonel Marshburn informed Mr. Horner that the government was in need of additional properties and was making a request for acquisition of Merchants Transfer's building.

(Testimony of Harry T. Meyers.)

He was also told that if certain other leased properties were approved and acquired by the government that it may not be necessary that they take immediate possession of this building. One of those properties was the Goodrich building which we later were given permission to occupy. Another property was the Hines building on Atlantic street and Utah. Another property that was later acquired was the Henry Building on First Avenue South between Atlantic and Connecticut streets. Another property was the Moran building adjoining the Henry Building which was acquired.

Both those properties, the Moran and Henry buildings, were warehouse space. The Goodrich building was warehouse space and was used for that purpose after we immediately acquired it.

All of these properties were less desirable than the Merchants Transfer building as far as accomplishing the mission of the Port was concerned.

The Henry building and the Moran building was across First Avenue and meant that any storage of or use of that building we would have to fight the traffic on First Avenue, Alaskan Way, and the railroad traffic which we wouldn't have to fight if we had the Merchants Transfer building. [40]

So the government and the Port did everything in its power to utilize all available space within the area without disrupting the function of the Merchants Transfer building until it became essential by the Secretary of War that it was now necessary

(Testimony of Harry T. Meyers.)

that this property be acquired and for the mission of the Port.

The details of the mission of the Port is not for us to determine. The Secretary of War knows the war plans and the mission of the war program. We are planning the Port mission to conform with the wishes of the War Department.

Q. This Henry building was the building that was occupied by the Reliable Transfer and Storage,—a portion of it was?

A. That is correct.

Mr. Falk: May it please the Court, that was condemnation under action,—I believe number 705 of this Court.

Q. (By Mr. Falk) And the Henry and the Moran buildings are both being used by the government at this time? A. That is correct.

Q. And you will continue to use them?

A. That is correct.

Q. And you will need these facilities of the Merchants Storage in addition to these other facilities that you now already have?

A. That is correct.

Q. Did you have any other contacts with the Merchants Transfer and Storage subsequent to the one you referred to? [41]

A. Not personally. Since that day I haven't been in the building.

Q. During the earlier hearings there was some implication as to vacant space on the property,—well, it would be in the northerly section of the map

(Testimony of Harry T. Meyers.)

there, immediately to the west of which pier "D" I believe is being constructed. Can you explain whether or not any vacant space there could be utilized?

A. There is no vacant space within the Port area that could be utilized for any other purpose.

In order to find space for a fire station we are now contemplating it is now necessary to move this gas station at the corner of Connecticut street and Alaskan Way. We feel that a fire station is more essential than a gas station.

We have been trying to locate facilities to feed colored and white troops now at the Port. There is no additional space that could be utilized for that purpose as all the other open areas are necessary for open cargo storage. It is necessary that open space be available for storage of articles and equipment which can not be placed within the pier shed prior to trans-shipment. These spaces are sometimes vacant for periods of time between shipments or movements from this Port. At other times every inch of available space is used for accumulation of cargo from construction materials and building materials to trucks, guns, tanks and equipment of all kinds used in military maneuvers.

The space in front of the piers, in front of the new pier "D" and "E", a good portion of that will be [42] utilized for spur tracks serving these piers. The areas between the spur tracks will be used for open cargo storage.

(Testimony of Harry T. Meyers.)

Q. Have you any idea, Major, what length of time it would take to move the property which is in the Merchants Storage and Transfer building out from that building?

A. Any statement I would make would be on how fast the government and War Department could move it. I think Mr. Horner said he did one million tons, or million pounds of business during the month of June.

Q. I think that was one item.

A. If he had to move 10,000 tons, it would take him——

Q. Major, in your opinion could this property be moved out of that building by August 31st?

A. I would say that the War Department could move it out of there by August 31st. I don't know what organization Mr. Horner has to move it. But if the amount of material he said he moved in the month of June was moved through his warehouse, he could easily move the 10,000 tons out between now and the end of the month.

Mr. Falk: You may cross examine.

Cross Examination

By Mr. Stedman:

Q. Major Meyers, did you have any negotiations with the owner of this building as to the acquisition of it?

A. The Merchants Transfer building?

Q. Yes.

A. I had no contact with the owner.

Q. Do you know, as a matter of fact, that the

(Testimony of Harry T. Meyers.)

government did [43] have an option on the purchase of the building subject to the lease?

A. Those real estate matters are handled through the real estate office.

Q. You had no personal dealings with the owner?

A. Not with the owner, no, sir.

Q. No contacts with him?

A. No contacts with him.

Mr. Stedman: No further questions.

Cross Examination

By Mr. Griffin:

Q. I gather from the entire testimony that the taking of this property is vital to the War Department at the present time and the plans of the Port of Embarkation? A. That is correct.

Q. That being the case, and considering your testimony as to the location of this property and the necessity of the taking, why is the taking of the lease only and not of the property, itself?

Mr. Falk: May it please the Court, I think that is entirely beside the issue of this hearing as to whether the government takes the use of the property or takes the title is a matter for the Secretary of War to determine. The government objects to the question on the ground it is irrelevant and immaterial. Furthermore, that it is not the province of this witness to determine that.

The Court: Do you wish to state the purpose, —what you seek to prove or what issue this question bears [44] upon?

(Testimony of Harry T. Meyers.)

Mr. Griffin: It bears upon the arbitrary and capricious action of the government.

The Court: Objection overruled.

Mr. Falk: Furthermore, that it is not proper cross examination.

The Court: The objection is overruled.

A. My answer to that would be that the Secretary of War determines the method of acquisition of the properties.

Q. (By Mr. Griffin): As far as the acquisition of this property is concerned, are you relying upon any written document or directive from the Secretary of War other than,—may I have the original file, if your Honor please—I don't know whether this is called a directive—I called it a letter to begin with—of July 29, 1943, which I find in the original file in this action, marked "Filed August 2, 1943"?

A. You say, am I relying upon any information?

Q. Any other written document from the Secretary of War in so far as this particular taking is concerned, other than this document?

A. That the property is necessary for the government?

Q. Yes, any other written authorization from the Secretary of War?

A. I am relying that this in itself is sufficient. It says that the property is necessary for the vital success and prosecution of the war.

Q. By "this" you mean this letter from which you are reading of July 29, 1943?

(Testimony of Harry T. Meyers.)

A. That is correct. [45]

Q. Found in the original files, marked "August 2, 1943."

The Ames Terminal to which you referred, the government has a part of its facilities has it not?

A. Some branch of the government may have it. It is not under the Port of Embarkation.

Q. The Pacific Terminal Building you said was the first one that was taken?

A. Pacific Steamship.

Q. Pacific Steamship. That building had warehouse facilities that were turned into offices, didn't it, turned by the government into offices?

A. Offhand, I don't recall any warehouse space that was turned into offices.

Q. Are they using any warehouse space in that building now?

A. What building? There are several buildings.

Q. The original Pacific Terminal?

A. The property had approximately 12 buildings on it.

Q. Well, there was one,—before the Port of Embarkation—there was one main Pacific Terminal building that was used by the Pacific Terminal wasn't there?

A. There were four. There was the administrative building which is now the administrative building number one. That was their administrative building.

Q. Are any of those four buildings now being used for storage?

(Testimony of Harry T. Meyers.)

A. No, they are not; except cargo storage on pier "A", the pier shed,—not warehouse.

Q. How much warehouse storage space was in those buildings at the time you took them over, being used by the Pacific Terminals or had been used for storage? [46]

A. In those four buildings there was no space used for warehouse purposes. Pier "A" was used for cargo purposes and is now used for cargo purposes.

Q. Pier "D" which will be completed in August has how much floor space?

A. The exact quantity I don't know. It is about 900 feet long and 120 feet wide, the transit shed. The pier itself is longer.

Q. Carrying a load of what?

A. The loading capacity there,—I don't know the exact amount—it will be around 400 to 500 pounds.

Q. You spoke of taking over the A. M. Castle steel shed. That was a shed for the storage of steel wasn't it, in large quantities?

A. For the storage of steel and the cutting.

Q. That is what it was, was the shed?

A. That is right. It was a sheet metal and wood timber constructed building.

Q. The Port of Embarkation has the Stacy Street Terminal taken over from the Port Commission hasn't it?

A. That is correct.

(Testimony of Harry T. Meyers.)

Q. The storage load capacity in that terminal was 350 pounds, wasn't it? A. I don't know.

Q. You have converted that terminal and that space into office space, haven't you?

A. Not the Stacy Street pier nor the Lander Street pier. The warehouse between Stacy and Lander streets which is part of the terminal is being used by the District Engineer in Seattle for cargo inspections and traffic [47] control.

Q. And office space?

A. Generally office space.

Q. Generally office space.

The Court: Was it formerly used for warehouse space, storage space?

The Witness: The State Liquor Board had the warehouse in between, in the front end of Stacy street, there.

Q. (By Mr. Griffin): It was constructed as a storage warehouse wasn't it?

A. That was the intent of the building.

Q. And was so used up to the time you took it over?

A. It was used by the Liquor Board.

Q. I think you stated that you had established as far back as June of 1942 an Air Raid Shelter and First Aid Station in the Merchants Transfer building?

A. That is correct; some time around that date.

Q. It has been there ever since?

A. As far as the Air Raid Shelter is concerned,

(Testimony of Harry T. Meyers.)

they use it in the event of an air raid or air raid practice.

First Aid facilities, I have no knowledge of whether they have first aid equipment in there or not at the present time.

Q. Just briefly in reference to fire hazard, do you know any building in the city of Seattle that has any better fire equipment,—defense, if you want to use that term—construction throughout; I am not speaking of the construction of the building, but fire defense equipment, automatic sprinkler system theroughout,—any other [48] building in Seattle any better equipped than this one?

A. Well, it has a sprinkler system in it. Other than that,—as I say, I haven't been in it since one year ago this last June. I don't know what hand equipment they have in it. But it does have an automatic sprinkler system in it and I understand the A.D.T. have coverage over the building. But I will add this, that in comparison with the fire protection that the Port gives its buildings and the equipment we have in our building, that this building wouldn't begin to compare as a safe structure within the Port area.

Q. Well, the construction of the building itself is of wood is it not?

A. It is a mill constructed building with concrete walls.

Q. Whereas you have many buildings of concrete construction?

(Testimony of Harry T. Meyers.)

A. That is correct. We have many buildings of frame construction also.

Q. I said: You have many buildings of concrete construction? A. Yes. That is correct.

Q. Yes. The fire hazard is less in a concrete building than a frame building?

A. Certainly.

Q. Yes. The situation at least has been such that in the buildings taken over by the Port of Embarkation you have taken over warehouse buildings and transferred them or transformed them for other uses? A. Well, that is correct.

Mr. Griffin: That is all. [49]

Redirect Examination

By Mr. Falk:

Q. Major, do you have anything to add in explanation of your last answer?

A. In transforming these warehouse buildings to office space?

Q. Yes.

A. I will say this: That the alteration of and transformation of these buildings has been necessary to provide for offices and administrative functions for the Port of Embarkation for which no other facilities were available. A request for construction of a new office building was made to the War Department at one time, but it was determined by the War Department that it was more expedient and economical to convert warehouse space into essential offices than to use critical ma-

(Testimony of Harry T. Meyers.)

terials and the delay in construction time for building new facilities when the areas for new office space were not available in and adjacent to the Port area. They were required for other cargo operation purposes.

Q. (By the Court): Do you regard office space as indispensable to army business conduct?

A. Certain office space in connection with the cargo operations require their presence on the Port properties and are as essential as cargo.

Q. Is it more necessary in a place like Seattle than it is in the field of military operations; I mean on the battlefield for instance; how do they get along on the battlefield without an office?

A. They get along with tents or whatever facilities are [50] available.

Q. Do weather conditions affect that situation as to the need,—the indispensable need of office arrangements for the conduct of army business?

A. Well, it is essential within the city of Seattle, I would say, that the offices for administrative purposes be protected from the elements and provided with light and heat.

Q. Compare that with Alaska. Do you have offices and office buildings in Alaska for general Buckner and his administrative staff?

A. Well, fixed installations,—they have a certain amount of office space, yes, sir.

Q. Do they sometimes use tents or what they call huts?

A. Oh, they do.

(Testimony of Harry T. Meyers.)

Q. Do they ever use huts or temporary buildings as shelter? A. In tactical areas.

Q. Now in Seattle the weather is usually not very severe is it; wouldn't it permit the use of tents for office purposes?

A. Well, in an emergency you can use tents or whatever means are available.

Q. At Fort Lewis, Washington, do they use any tents at all for staff use?

A. Well, in the outlying organizations they may use tents for troop administrative use.

Q. The weather here, weather conditions, climatic conditions are supposed to be ideal for outside work of the army are they not?

A. I think that the military personnel wouldn't object [51] to the weather conditions and inadequate facilities for offices. When you are required to use civilian personnel for the majority of your administrative use and Port operations, your facilities have to be slightly better than that in order to get the civilian personnel to work for you.

Q. How do the conditions of need and of beneficial use of office space in an office building in this war condition compare with a similar need in the first world war, do you know?

A. I am not familiar with the needs of the first world war.

Q. Do you know the history of it with respect to the need for office buildings to carry on army business in Seattle?

A. Not in Seattle, no, sir.

(Testimony of Harry T. Meyers.)

The Court: Any other questions?

Q. (By Mr. Falk): Has the Port of Embarkation constructed any warehouse facilities, any new buildings on the Port site?

A. Since its acquisition?

Q. Since its acquisition?

A. Well, the first building was this large warehouse building designated as building 7 on the corner of Alaskan Way and Massachusetts street.

Q. What is the size of that building approximately, Major?

A. It has,—it is a three story structure of reinforced concrete and extends between 200 and 300 feet along Alaskan Way and more or less the same distance down Massachusetts street. It is an irregular shaped structure. That is now the building that is being used for transit storage. [52]

There has been a cold storage building constructed which has about 40,000 feet of cold storage immediately west of building number 7. There has been a small longshoremen's mess hall constructed west of building 7, along Massachusetts street.

The new pier "B" has been constructed in the old location of the Atlantic street "A" dock.

Immediately north of the administration building number 7 is a communications building which has been recently constructed.

Building 14, the structure formerly occupied by the Merchants Transfer Company has been completely renovated and remodeled for warehousing

(Testimony of Harry T. Meyers.)

and offices incident to warehousing of supplies required at the Port installation.

The old A. M. Castle steel shed has been completely remodeled for a marine repair shop.

The Court: You mean that is the present use, for marine repair?

The Witness: Marine repair shop. Yes, sir.

A. (Continuing): The present pier "C", the old Atlantic "B" of the Port of Seattle is now up for remodeling into an outfitting pier to be used in conjunction with marine repair shop, and equipped with an installation for the repair of ships and a 45-ton gantrey crane to be used in the repair of ships.

Mr. Falk: I believe Major Meyers has some photographs showing the present situation there and also showing the situation before the Port went into their possession. They are, of course, confidential and couldn't be [53] introduced in evidence but if the Court and Mr. Stedman and Mr. Griffin care to see them?

The Court: Do you care to look at those pictures?

Mr. Griffin: I do not.

The Court: The Court would not care to look at them unless all were willing.

Mr. Falk: I might state that I was familiar with the situation before the Port of Embarkation went in there and I was astonished at the changes and improvements and expansion that has taken place down there.

(Testimony of Harry T. Meyers.)

The Court: If you feel it is material and unless there is objection the Court will look at this suggested matter.

Mr. Falk: I can't state that I feel it is material because I feel that the position of the government is sound that we are entitled to the immediate possession of the property. The government has objected to any testimony along the line of that introduced by the respondents, therefore I could not state to your Honor that I feel it is material to the issues. It is the government's position that it is outside the issues. It is the government's position that it is outside of the issues.

The Court: As I understand the theory upon which the respondent has asked the Court to hear this testimony and the class of it that you were mentioning in your last statement, is that it goes to the question of good faith of the government and the question of whether or not the government was acting arbitrarily and capriciously in the taking of this limited lease date of one year on this [54] warehouse property, in view of all of the circumstances of warehouse space already controlled by the government and in view of the small amount of warehouse space available to civilian services.

It is my understanding that is the theory of the respondents offer of testimony along this line and on that theory the Court feels that it is admissible.

It is not merely that, assuming good faith and the lack of arbitrariness or lack of capriciousness on the part of the government, and a finding by the

(Testimony of Harry T. Meyers.)

proper department head on the question of necessity, would be binding upon the Court where you do have admitted good faith, absence of arbitrariness and capriciousness, the Court agrees with you that this case from Montana, decided recently by the 9th Circuit, whether you and I as individuals would agree with it or not, is binding upon this Court. But I feel that counsel for the respondents should be permitted to develop their theory of defense in this cause.

Mr. Falk: I do appreciate that, your Honor. I was merely making a suggestion as to the fact that Major Meyers had these photographs in the event your Honor was interested and that counsel desired your Honor to see them, because it does show the situation there. I think it has been fairly and accurately portrayed by the witness.

May it please the Court, at this time the government offers into evidence the letter that has been referred to from the Acting Secretary of War, Robert P. Patterson, dated July 29, 1943, which bears the stamp, [55] "Filed in the United States District Court, August 2, 1943."

(Letter dated July 29, 1943, marked for identification as Petitioner's exhibit 3.)

Mr. Falk: At this time the government requests that it be marked as Petitioner's exhibit 3 for identification and offers it in evidence.

Mr. Stedman: If the Court please, I object to it being offered in evidence because the statute gives

(Testimony of Harry T. Meyers.)

the Secretary of War certain authority. We are required to take notice that the Secretary of War is Mr. Stimson, and there is no showing that the Secretary of War was absent or disabled at the time this letter was executed.

Mr. Griffin: This respondent objects upon the ground and for the reason that it is incompetent, irrelevant, and immaterial, and more specifically that there is no such designated officer of the United States as the Acting Secretary of War, but specifically the statutes specify precisely that personnel of the War Department, in so far as the administrative agencies are concerned, and quite specifically there is no Acting Secretary of War.

There is by statute an Assistant Secretary of War; and there is by statute an Undersecretary of War.

Mr. Falk: Mr. Griffin, will you concede that Mr. Patterson is the Undersecretary of War?

Mr. Griffin: I will concede nothing as far as this case is concerned upon this offer.

Mr. Merrick: Counsel having examined the witness with reference to certain documents and it later being [56] offered in evidence, he is precluded from objecting to it. He has used it as evidence. It is highly technical but I think it is a true statement.

Mr. Stedman: He hasn't used it as evidence. I have not used it.

Mr. Merrick: That may be right.

The Court: Does the letter purport to be an official act of the Acting Secretary of War?

(Testimony of Harry T. Meyers.)

Mr. Merrick: Yes, it does, your Honor.

The Court: There is a recent statute passed by Congress about 1936 relating to the proof of public records. If counsel present or any one of them would remind the Court of the citation of it, if you have it?

Mr. Falk: I am inclined to think offhand that it is title 28, your Honor, but I wouldn't be absolutely certain. I wonder if your Honor wishes if we might have the bailiff bring title 28?

My recollection is as your Honor states that government official records are admissible under certain circumstances and that this particular letter comes within that category.

The Court: Mr. Holland, would you go to my chambers and ask Miss Coleman to send down the statute relating to the certified copies of public documents?

I will suspend the ruling on this, unless you wish to make a further statement on it and insist upon the Court ruling at this moment.

Mr. Falk: I make no such insistence, your Honor. I wanted to ask Major Meyers an additional question.

The Court: You may do that. [57]

Q. (By Mr. Falk): Will you state whether or not Robert P. Patterson is the Undersecretary of War?

Mr. Griffin: Objected to as not the best evidence.

The Court: Would you read the question, Mr. Reporter, please?

(Testimony of Harry T. Meyers.)

(Whereupon the last question was read as recorded.)

The Court: You might ask him whether or not he knows by reason of the conduct of his day to day business.

Q. (By Mr. Falk): In the conduct of your business with the United States Army, do you know who is the Undersecretary of War?

A. Well, it is my understanding that Robert Patterson is the Undersecretary of War from documents——

Mr. Stedman: I object if the Court please and move that the answer be stricken on the ground that the statement of the witness is a conclusion. He was asked if he knows a certain thing, which calls for a yes or no answer. His thoughts are a volunteered statement of his information on the stand.

The Court: Don't you think that your question called for a yes or no answer? Let him give such considerations as he may think are available to him by reason of the conduct of his business and the information gained by him in the conduct thereof. But his answer should be more specific than the one he gave.

That motion is granted. It is stricken. The Court will disregard it.

Q. (By Mr. Falk): In the course of your official duties are [58] you able to state who is the Undersecretary of War? That would call for either a yes or no answer, Major.

(Testimony of Harry T. Meyers.)

A. My answer would be no, because I have never seen the appointment papers making him Undersecretary of War. But I will state that I have seen——

Mr. Stedman: I will object to any further statement of the witness. He has answered the question.

The Court: Sustained.

Mr. Falk: May it please the Court, the government takes the position that the Court can and should take judicial notice of the fact that Mr. Patterson is the Undersecretary of War.

Mr. Griffin: I think as far as the respondent is concerned, this particular respondent, for the purpose of this record, that I will acquiesce if the Court will take judicial notice of a statutory office; to-wit the Undersecretary of War. By the same token he will take judicial notice that there is no such office as the Acting Secretary of War.

Mr. Falk: Do I understand, then, Mr. Griffin, that you concede, or do you concede that Mr. Patterson is the Undersecretary?

Mr. Griffin: I do not. My concession was that the Court would take judicial notice of a statutory office.

Mr. Falk: Very well. May it please the Court, there also has been filed in this cause a letter from the Attorney General. I wonder if I might have the Court's file?

May it please the Court, at this time the government asks to be marked as Petitioner's exhibit for identifica- [59] tion number 4, a letter from the

(Testimony of Harry T. Meyers.)

Department of Justice, dated August 30, 1943, to Mr. F. P. Keenan.

(Letter dated August 30, 1943, marked as Petitioner's exhibit number 4 for identification.)

Mr. Falk: May it please the Court, at this time the government offers into evidence petitioner's exhibit 4 for identification.

Mr. Stedman: I object to the introduction of this document into evidence if the Court please because on its fact it purports to be,—it recites "Having received a communication from the Acting Secretary of War." By statute I know of no such officer. The statute speaks of the Undersecretary of War who succeeds to the duty of the Secretary of War during his absence or disability. And during the Absence of the Undersecretary of War, the Assistant Secretary of War succeeds. There is no such statutory officer as the Acting Secretary of War. Therefore, I object to this.

Mr. Griffin: I make the same objection on behalf of this respondent. I call your Honor's attention that in two places in that letter, there, it is referred to the Acting Secretary of War, referring to this other document upon which you are reserving ruling.

No reference is made at all to the Assistant Secretary of War or Undersecretary of War, the only two statutory officers.

Mr. Merrick: May it please the Court——

(Testimony of Harry T. Meyers.)

The Court: What are you about to refer to now?

Mr. Merrick: Section 5, entitled,—Section 5 [60] and Title 5.

The Court: You mean Title 5, Section 5?

Mr. Merrick: Sections 4 and 5.

The Court: I have Section 5 and 6. Is there a volume called——

Mr. Falk: It is Titles 5 and 6, your Honor, included in the one volume.

Mr. Merrick: Right at the beginning of Section 4, Section 4 reads: “In the case of death, resignation, absence or sickness of the head of any department, the first or sole assistant thereof, unless otherwise directed by the President as directed in Section 6 of this Title, perform the duties of such head until a successor is appointed or until such absence or sickness shall cease.”

Under this Section there have been a number of judicial interpretations, all holding that the Court will take judicial notice of a public officer and that there is a presumption that an officer acting in the capacity, under the circumstances set forth under the statute, is acting legally.

In other words, the word “Acting Secretary of War” doesn’t make a lot of difference here. It only means that he is the Secretary of War ad interim, for the time being.

There is one case in 180 that was an appeal. “It will be presumed the contrary not appearing that the Acting Secretary was at the time lawfully exer-

(Testimony of Harry T. Meyers.)

cising the Secretary's powers and was authorized by this Section to do so."

Now, you will find in a decision by the United States Supreme Court, 109 U. S. 387, a document signed by [61] the first,—it says: "The signature of a first or sole assistant as the Acting Head of a department when attached to a document of that description of that department implies that one of the conditions implied in this section which authorizes him to act in that capacity had arisen."

In other words, when a document comes in to this Court or any other Court signed by the Acting Head of a statutory department, the Court takes notice of that department and presumes until the contrary appears that the man had authority to so act.

The Court: Now, that case is?

Mr. Merrick: 109, U.S., 387.

The Court: Will you let opposing counsel see that? You say that the Court must take judicial knowledge that the situation which comprises the condition of operation of the statute does exist by reason of the circumstance that the communication is written by one purporting to be the Acting Head of the department.

Mr. Merrick: Yes. In other words, there is a presumption that the thing has happened, devolving the duties upon him under the statute. That is only a presumption and it could be rebutted if there was any proof to the contrary. But the Court assumes that that is true if nothing appears to the contrary.

There are a large number of cases cited here.

(Testimony of Harry T. Meyers.)

We have read a number and there is nothing to the contrary that we have been able to find.

The Court: What is the page?

Mr. Griffin: Perhaps a more recent one on that, [62] however——

The Court: Just a moment, please, Mr. Griffin.

Mr. Merrick: Page 387.

The Court: And you read another one.

Mr. Merrick: 188 Federal, 350.

The Court: Is that on the same point?

Mr. Merrick: Yes. The case of Acting Head of a department, both cases are.

The Court: About the means of ascertaining the happening of the condition mentioned in the statute?

Mr. Merrick: Yes. "It will be presumed the contrary not appearing that the Acting Secretary was at the time lawfully exercising the Secretary's powers"—and that he was authorized to do so by this Section.

Here is a later case, 128, U. S., 50.

The Court: Now, Mr. Griffin, does your case hold to the same effect or does it hold to an opposite effect?

Mr. Griffin: Let's say it is analogous to this Section, rather than holding directly one way or the other upon it.

First, in as much as counsel is referring to cases already found in the notes to the Section itself, the one that I refer to is 135 Federal 2nd, page 196. It is an eighth circuit case condemnation, in which

(Testimony of Harry T. Meyers.)

the point raised below is that the action in condemnation must be taken in conjunction of one officer with another.

We are taking that same position here, when we get down to argument, that only the Secretary of War can act. The Court holds that that action is jurisdictional, having been raised below, subjects the cause to reversal [63] above and that the allegations of the petition are not in any wise assisted unless sustained by proof. I won't read it at this time but that is our position in that regard.

This case was cited in April of this year from the eighth circuit or determined in the eighth circuit at that time and so holds.

The Court: Will you allow counsel to see that?

Mr. Falk: As I recall the case, your Honor, it was under a special statute that required the action of two officials, the Postmaster General and the Administrator.

Mr. Griffin: That is right.

Mr. Falk: I might also call to counsel's attention *Marsh versus Nichols and Sheppard Company*, 128 U.S., at page 605.

The Court: Is that a different case from the 650 page? I wrote down 650 when Mr. Merrick was citing it.

Mr. Falk: I believe it should be 605, your Honor. And particularly to call your Honor's attention to the language at page 615, which reads as follows: "The signing of the instrument by Mr. Bell as Acting Secretary implies that one—(reads

(Testimony of Harry T. Meyers.)

section)—of the conditions on which he was authorized to act in that capacity had arisen. With his signature added, the instrument was complete. No other signature was required, the same person who signed it as Commissioner still continuing in office.”

I think the statement “The signing of the instrument by Mr. Bell as Acting Secretary implies that one of the conditions upon which he was authorized to act in [64] that capacity had arisen.”

Mr. Griffin: May I just state my position in that regard, or perhaps restate it?

Congress has been very specific in so far as the War Department is concerned, very specific to establish by Act of Congress the duties of the Secretary of War and by a separate Act or provision the duties of the Undersecretary of War. Then in reconsideration of the matter as evidenced by the date of the passage of the Act, by a separate Act entirely they designated an officer, an Assistant Secretary of War. The inclusion of the two excludes any Acting Secretary of War, under the very Acts of Congress that specify the office.

Mr. Merrick: If the Court please, we will take the case cited by Mr. Griffin. In that case one of the cabinet officers failed to function. Now, if he had functioned by an Acting Secretary I don't doubt but what the decision would have been different. But an Acting Secretary is acting in the capacity of Secretary. He is the Secretary. Normally and nominally he is the Undersecretary of

(Testimony of Harry T. Meyers.)

War. But if the Secretary of War should go to Europe or get sick and die he would step in there and call himself the Acting Secretary and under this statute he would have all of the powers that the Secretary has.

We have had Acting Presidents in this country. By courtesy we called them Presidents. When he is acting in that capacity he has all of the power and all of the authority under this statute. And it is a matter of right that the Secretary ought to have.

The Court: The Attorney General's opinions noted [65] here on page 14 of volume of the U. S. Code Annotated which includes titles 5 and 6, says that "When the Secretary is absent or sick, if the Assistant is in charge of the department," under this section he should sign as Acting Secretary.

Mr. Stedman: What is the section, your Honor?

The Court: That is under Section 4 on page 14, in the notes on page 14 of the volume which includes titles 5 and 6 of the U. S. Code.

It cites for that statement 19 opinions of the Attorney General, page 133.

The objections to petitioner's exhibit 3 and petitioner's exhibit 4 are overruled, and each of those exhibits is now admitted in evidence.

(Petitioner's exhibit 3 received in evidence.)

(Petitioner's exhibit 4 received in evidence.)

(Testimony of Harry T. Meyers.)

PETITIONER'S EXHIBIT No. 3

The Honorable,
The Attorney General,
Washington, D. C.

Dear Mr. Attorney General:

It is necessary and advantageous to the interest of the United States that a leasehold interest in certain real property known as the Merchants Transfer and Storage Warehouse Company, Seattle, Washington, be acquired by the United States of America.

Therefore, pursuant to the provisions contained in the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241), April 11, 1918 (40 Stat. 518; 50 U.S.C. sec. 171), and March 27, 1942 (Public Law 507—77th Congress), which acts authorize the acquisition of land for military or other war purposes, and the Act of Congress approved July 1, 1943 (Public Law 108—76th Congress), it is requested that you cause the necessary proceedings to be instituted for the condemnation of a term for years ending June 30, 1944, extendable for yearly periods thereafter during the existing national emergency at the election of the United States, notice of which election shall be filed in the proceeding at least 30 days prior to the end of the term thereby taken, or subsequent extensions thereof, together with the right to remove within a reasonable time after the expiration of the term or

(Testimony of Harry T. Meyers.)

extensions thereof, any and all improvements and structures placed thereon by, or for, the United States, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines. The property to be acquired contains 43,355 square feet of land, more or less, and is more particularly described in the inclosed Exhibit "A" and is shown on the inclosed map. The lands are purportedly owned by Louis L. Stedman, Hoge Building, Seattle, Washington and Merchants Transfer and Storage Company, Seattle, Washington.

The Act of Congress approved July 1, 1943, *supra*, appropriated funds to acquire the lands under consideration.

The aforementioned lands are to be used for the storage of military supplies and for other military purposes and the utmost haste in expediting this project is vital to the successful prosecution of the war. It is requested that pursuant to the provisions of the Act of Congress approved March 27, 1942 (Public Law 507—77th Congress), *supra*, you procure from the court an order granting to the United States immediate possession of the aforesaid lands.

Appraisal reports and title evidence are being obtained under the supervision of Lt. Col. M. J. O'Byrne, Division Real Estate Officer, Pacific Division, San Francisco Branch, Corps of Engineers, U.S.A., 351 California Street, San Francisco, California, and the probable date of availability of the appraisal reports and title evidence can be obtained

(Testimony of Harry T. Meyers.)

by your field representative from the Division Real Estate Officer. It is also requested that you instruct your local representative to furnish a copy of the petition direct to Lt. Col. M. J. O'Byrne at the above address.

Inclosed herewith are two additional copies of Exhibit "A" and two additional copies of the aforementioned map.

Sincerely yours,

(Signed) ROBERT P. PATTERSON

Acting Secretary of War.

2 Incls.

Exhibit "A" (in Trip.)

Map (3 copies)

Pursuant to T. 28 U.S. Code, Sec. 661, I certify this to be a true copy of the original record in this Department.

[Seal]

NORMAN M. LITTELL

Assistant Attorney General,
Lands Division, Department
of Justice

EXHIBIT "A"

Lot 4, Black's Replat of Portions of lots 18 and 19 of Block 368, Seattle Tide Lands, according to plat thereof recorded in Volume 11 of Plats, page 10, records of said county; Except the West 40 feet thereof; And

That portion of Lot 17, Block 368, Seattle Tide Lands, lying between the North production of the

(Testimony of Harry T. Meyers.)

East Line of said Lot 4 and a line parallel to said produced line and 10 feet West thereof, And

All of Lots 3, 5 and 6 and the West 40 feet of Lot 4, Black's Replat of Portions of Lots 18 and 19 of Block 368, Seattle Tide Lands, according to plat thereof recorded in Volume 11 of Plats, page 10, records of said county; And

That portion of Lot 17, Block 368, Seattle Tide Lands, lying between the East line of Lot 3 produced North, and the West line of Lot 6 produced North, Except the portion thereof lying between the West line of said Lot 3 produced North and a line parallel to said produced line and 10 feet West thereof; And

That portion, if any of Lot 7 in said Black's Replat of Portions of Lots 18 and 19 of Block 368, Seattle Tide Lands, and of said Lot 17, Block 368, Seattle Tide Lands lying West of East line of Lot 7 produced North, and covered or occupied by a concrete building chiefly on Lots 5 and 6 of said Black's Replat.

All in King County, State of Washington, containing 43,355 square feet, more or less.

[Endorsed]: Filed Aug. 2, 1943.

(Testimony of Harry T. Meyers.)

PETITIONER'S EXHIBIT No. 4

Department of Justice
Washington, D. C.

Address Reply to
"The Attorney General"
and Refer to
Initials and Number
RJL - HA
33-49-509
Air Mail

July 30, 1943

Mr. F. P. Keenan
Special Assistant to the
Attorney General
655 Skinner Building
Seattle 1, Washington

Dear Mr. Keenan:

Enclosed herewith you will find a certified and plain copy of a letter from the Acting Secretary of War dated July 29, 1943, in which he requests the institution of a condemnation proceeding to acquire a term for years in certain real property known as the Merchants Transfer and Storage Warehouse Company, Seattle, Washington. There are also enclosed an original and one copy of Exhibit "A," a description of the property, and two copies of a map showing the project site.

Will you please prepare and file a petition in condemnation and secure the entry of an order confirm-

(Testimony of Harry T. Meyers.)

ing possession pursuant to the Act of Congress of March 27, 1942. The Acting Secretary of War advises that the aforementioned lands are to be used for the storage of military supplies and for other military purposes and the utmost haste in expediting this project is vital to the successful prosecution of the war. Please advise the Department by wire the day and hour the petition is filed and the day fixed in the order of the court for the surrender of the property, together with the civil number assigned to this proceeding. Thereafter forward plain and certified copies of the petition and order of possession.

Please note that the estate to be acquired is a term for years ending June 30, 1944, extendible for yearly periods thereafter during the existing national emergency at the election of the United States, notice of which election shall be filed in the proceeding at least 30 days prior to the end of the term taken, or subsequent extensions thereof, together with the right to remove within a reasonable time after the expiration of the term or extensions thereof, any and all improvements and structures placed thereon by, or for, the United States, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines. The property to be acquired contains 43,355 square feet of land, more or less, and is more particularly described in the enclosed Exhibit "A" and is shown on the enclosed map. The lands are purportedly owned by Louis L. Stedman, Hoge

(Testimony of Harry T. Meyers.)

Building, Seattle, Washington, and Merchants Transfer and Storage Company, Seattle, Washington.

The War Department advises that appraisal reports and title evidence are being obtained under the supervision of Lt. Col. M. J. O'Byrne, Division Real Estate Officer, Pacific Division, San Francisco Branch, Corps of Engineers, U. S. A., 351 California Street, San Francisco, California, and the probable date of availability of the appraisal reports and title evidence can be obtained by you from the Division Real Estate Officer. It is also requested that you furnish a copy of the petition direct to Lt. Col. M. J. O'Byrne at the above address.

Respectfully,

For the Attorney General

NORMAN M. LITTELL

Norman M. Littell

Assistant Attorney General

Enclosure

No. 824379

[Endorsed]: Filed Aug. 2, 1943.

Mr. Merrick: That is all of our testimony. Do you have any questions?

Mr. Griffin: Yes, I have.

Cross Examination

By Mr. Griffin:

Q. I understood you to testify that the Merchants Warehouse and Storage building that was

(Testimony of Harry T. Meyers.)

taken over two years ago had now been turned partially into offices, is that correct?

A. It contains offices in connection with the administration of the section and division occupying the storage area of the warehouse. [66]

Q. And that building was a warehouse building constructed up to the first two stories with stone, wasn't it?

A. It has stone for sidewalls and foundations.

Q. Load capacity of 350 to 400 on each floor?

A. The lower floors.

The Court: How did it compare in size with this building now in question here?

The Witness: Well, roughly, without checking it accurately, I would estimate that there is less than 50 percent of the square footage.

The Court: In that building as in this?

The Witness: In the former building as in this building in question.

Q. (By Mr. Griffin): As far as square footage is concerned, yes,—but as far as tonnage capacity is concerned, the first building had a greater tonnage capacity than the second is that not correct?

A. That I don't know. I never had occasion to figure it.

Mr. Griffin: That is all.

Mr. Merriek: That is all.

(Witness excused.)

Mr. Griffin: Respondent rests.

The Court: As I understand it, both of the respondents do now rest?

Mr. Stedman: Yes, your Honor.

The Court: Let the record show that.

Mr. Merrick: If it please the Court, the Petitioner at this time moves the Court for an order granting the United States immediate possession of the premises [67] described in the petition and in the testimony of the witnesses.

(Argument by Mr. Merrick on the above motion.)

(Argument by Mr. Stedman on the above motion.)

(Argument by Mr. Robinson on the above motion.)

(Final arguments made by counsel for petitioner and respondents.)

(Whereupon the following Oral Decision was pronounced by the Court:) [68]

CERTIFICATE

State of Washington,
County of King—ss.

I, Merritt G. Dyer, do hereby certify that I acted as the court reporter in the proceedings entitled "United States of America, Petitioner, versus 43,355 square feet of land, more or less, situate in King County, State of Washington; Merchants Transfer & Storage Company, a corporation; Skinner & Eddy Corporation, a corporation, et al, Respondents" being Number 781, held before the Honorable John C. Bowen, one of the judges of the Western District of Washington, Northern Di-

vision, beginning at 9:30 A.M. on August 7, 1943 and concluding at 1:30 P.M. on the same day, and did report in shorthand all the testimony and proceedings given and had during said trial; that thereafter I transcribed all of said testimony into typewriting as hereinabove set forth; that my shorthand notes of said testimony are full, true and accurate, and that the foregoing transcript of the testimony is a full, true and accurate transcript of my shorthand notes, and that the witnesses sworn at said proceedings did in fact testify as transcribed in said transcript of testimony, numbered from 1 to 68 inclusive, preceding this certificate.

Dated at Seattle, Washington, this 25th day of September, 1943.

MERRITT G. DYER

Court Reporter

[Endorsed]: Filed Oct. 4, 1943. [69]

[Title of District Court and Cause.]

Be It Remembered, that the above entitled matter came on for hearing before the Honorable John C. Bowen, Judge of the above entitled Court, Saturday, August 7, 1943, at 9:00 a.m.

COURT'S ORAL DECISION

The Court: Was there anything else that needs to be said by anyone that has been overlooked?

I think the interests of all concerned strongly indicate that the Court's decision in this matter should be promptly made. All connected with the case of course will recognize an oral decision will not be in form as good as the Court would like to have it. But the public interest in this matter and the interests of all the litigants seem to me to require that the Court at least announce the Court's decision.

The first point, it seems to me, to require consideration by the Court is that one made by Respondents (through Mr. Griffin) that the Acting Secretary of War was not shown to have authority to initiate these proceedings in [1*] the manner that has been done. I am however of the opinion that the statutes cited and relied upon by the Government do authorize the Acting Secretary to institute these proceedings and that this act of the Acting Secretary, Mr. Patterson, is sufficiently shown to be authorized and that the same is in fact authorized and that the objections of the Respondents upon that ground should be and are overruled.

As contended by Petitioner, the Court is of the opinion that the case of the United States vs. State of Montana reported in 134 Fed. 2d Series beginning at page 194 is authority for the principle or rule of law that when the Government Department

* Page numbering appearing at foot of page of Oral Decision.

through its proper official such as the War Department in good faith determines and finds necessary that the Government acquire by condemnation a certain piece of property owned by a citizen, that such determination is binding upon this Court. The Second War Powers Act gives the Department heads in connection with the condemnation the right, as a preliminary and advance step in the proceeding, to, under the conditions stated by that statute, obtain possession for the Government before the Government takes title to the property, but in my opinion it is required that the Government proceed in good faith, constructive good faith as well as good faith in fact, and that the proceeding be not arbitrary or capricious. And I think that this Court is required upon having that issue tendered to hear the testimony relating to it and to consider the issue and to determine the issue upon the evidence before the Court.

In that connection I want to say I now believe there was properly admitted certain evidence which was admitted over Petitioner's objection upon the ground announced by the Court that Respondents should thereby have the opportunity of making their record even though the evidence might [2] be properly excluded under the rule of *United States vs. Montana Supra*. I now believe such evidence was properly admitted under the issue raised by Respondents' contention of bad faith etc.,—an issue made clearer to the Court as the trial progressed. The Court as the trial progressed became more clearly aware of Respondents' theory

that the Petitioner has not exercised good faith but has acted arbitrarily and capriciously in selecting this property for condemnation and possessory proceedings.

If this proceeding had been instituted against this property as the first piece of property in this locality taken or to be possessed by the Government, and if the Government had shown the need of warehouse space for the handling and storage of army and navy ordnance, and army and navy supplies of all kinds, and before the Government acquired any other such space, or before the Government required any other such space which was anyway near adequate to meet its requirements, I am certain that the Court would have no difficulty in finding that the proceeding was in good faith.

The Court must consider all of the facts here shown. Among them the Court should consider and has considered the nature of the Government's property to be stored on these premises, whether that property is of such a nature as to indispensably require this particular space now; whether it could be just as well cared for out in the open in the weather, or whether it could be just as well cared for on some other premises; whether the facilities for storing it must be ideal from the standpoint of ventilation, care and custody; whether it needs constant attention or guarding against deterioration by action of the elements or the inherent nature of the goods themselves; whether the amount of other warehouse space in the vicinity of the property in [3] question already acquired by the Gov-

ernment is sufficient for the Government's present or reasonably prospective needs; whether such space of this kind as the Government has already acquired and now has control of is sufficient for its needs; whether the Government warehouse space already acquired in the vicinity is being efficiently used by the Government for that purpose or whether or not, after acquiring it, the Government has immediately converted its use to some other use so as to indicate that it wasn't warehouse space that the Government then needed or now needs, or whether the Government needs the space for some purpose other than warehousing and storing.

In connection with the consideration of the nature of the Government property, thought by the Government to need these facilities, we should consider the circumstances as shown by the evidence that it consists or is expected to consist of metal pipe, metal pipe fittings, metal ship repair parts, and ships stores; whether such property could be as well accommodated on premises now owned or controlled by the Government.

We should also consider, and the Court has, the emphasis laid by the Petitioner's witnesses on the development program at or near the Port of Embarkation in the vicinity of this property involved in this action such as the desire as expressed by these witnesses and concern on their part about proper policing and fire control of the Government's property in that vicinity as affected by this property here in question remaining without and not within the Government control. We should

consider whether or not the Government's action here is influenced by such a desire as that just mentioned, that the Government might find it more convenient to police and guard against fire hazards its property already [4] acquired if this property was also acquired; whether or not so far as policing and protecting against fire hazards are concerned, the public authorities which now have jurisdiction over this property can adequately deal with the situation; whether or not the situation of this property in its relationship with other property nearby which the Government already has acquired is in the nature of a mere remnant which, merely for purposes of policing and control as a whole, is an outstanding object in the Government's program, influencing the Government's determination to acquire this property.

We should also consider the circumstance of the convenience of the whole public as affected by the presence of the Army and its work in the community, and as affected by the presence of the civilian population, and as to whether or not the civilian population will really suffer in its services of necessary supply if this property should be withdrawn from such supply servicing to civilians. That as well as all of the foregoing it seems to me might very well have some bearing upon the Government's good faith in this proceeding.

I am not sure whether I have previously mentioned it or not but certainly the Court on this issue of good faith or arbitrary or capricious action

should consider the evidence that some of the warehouse space already acquired by the Government has been or is being converted into office space and usage and is not being used for warehouse and storage purposes as formerly, and as such space was used before it was acquired by the Government.

I think the Court ought to say that it believes that the evidence shows that such convenience is great on both sides, considering Seattle's Port of Embarkation and the movement of military supplies through that Port at this time. [5] I didn't mean in that statement to include the need of this specific property. I meant the need in the community which the civilians have with respect to this kind of a service and the need which the Army has with respect to this kind of a service.

If the Army didn't have any other warehouse space nearby or reasonably nearby, that would be an added fact favoring the Government's position which doesn't now exist. The truth is that the Army does have a lot of warehouse space nearby, and has had other warehouse space which has been converted to uses other than warehouse and storage uses.

The evidence is that so far as service to the civilian public is concerned, there isn't any other service which is comparable to this and that this warehouse and storage service is practically indispensable to the public.

I believe the Court could more easily resolve this question were it not for the circumstance that

part of the valuable warehouse and storage space used for storage before acquisition by the Government has, after acquisition by the Government, been converted to office space. That is a strong circumstance that naturally leads to the inquiry: What use, in fact, is the Government going to make of this space after it gets it; will it use it to store this iron pipe and metal pipe fittings and consumable ships stores or will it after days or weeks convert this warehouse to other purposes such as office uses? That inquiry might just as well be made as to this property now as it could have been made as to the other warehouse property before the government acquired it and converted it to office use. The evidence is undisputed that the former State Liquor Warehouse and the Russell Warehouse were actually converted into office uses after they were condemned by the Government during this war. [6]

Mr. Merrick: Could I interrupt the Court for a moment?

The Court: I would prefer that you would reserve your comment until the Court has completed announcing the Court's decision. After that is done I will be very glad to give you an opportunity to make any further statement you wish.

Upon a consideration of all of the evidence before the Court on this issue, I have no hesitancy in saying I do not believe that it is necessary for the war effort that the Government now acquire this warehouse as a place to store metal pipe, metal pipe fittings, metal repair parts for ships, and

ships consumable stores. Everyone knows that such property is customarily stored in any kind of a building. Some of it is stored outside. Some of those metal goods are often stored outside for a limited or longer period of time; and ships' consumable stores may be stored in any kind of a building that has a shelter over it such as docks and ordinarily is stored on any dock in Seattle.

So far as having these kinds of property, the metal pipe, pipe fittings and the ship repair parts, stored at a place where it can be used on a ship while it is lying at any berth,—for instance a berth at the Port of Embarkation—, there is no showing here that that is a situation any different than that attending private operation of ships.

The Court's view of the evidence might be strengthened from the standpoint of the good faith of the Government in taking this property and if the class or nature of the property to be stored in this place was something that had a peculiar need for the protection of this character of a building or possibly if it was Army or Navy Ordnance of some kind. Any kind of a building will house a pipe fitting or a metal pipe. [7] And a shelter of any kind, or sometimes no shelter at all for a limited time anyway, would be sufficient,—any place where it can be segregated and protected.

In making these observations and stating these findings and conclusions the Court does not say or imply that any particular officer of the Government or any particular military man has gone out with a deliberate attempt to act facetiously with

respect to the public generally. So far as I know each inspector and appraiser of this property may have done every act that he did in response to the order of some superior located in some other place.

The Court's conclusions relate to the situation as a matter of law, not as a matter of any express design going to the question of proper lawful or other kind of motives of the particular official or military man who may have made an appraisal or an inspection or a report. Rather the Court's conclusion is more the result of the Government's past action in converting good warehouse space into office uses, and of the possibility that in view of past acts in respect to similar property the Government may change its program as to this property tomorrow.

I want to say at this point that the contention made by Counsel for the Respondents, in effect that we should consider the future financial welfare of the Respondents, offers no criterion by which to determine whether or not the Government may in good faith condemn these respondents' property for a Government use. As observed by Counsel for the Government, the property of all citizens is held subject to the paramount right to be in good faith condemned for a public use by the Government of the United States. And the fact that it may prove a hardship upon the owner of the property is no defense against the exercise by the Government of that paramount right of eminent domain. [8]

This evidence and all of the evidence in the record above discussed have been discussed by the Court in connection with this issue of whether or not the Government in fact or in law has in this proceeding acted capriciously and arbitrarily with respect to this particular piece of property. And the Court is of the opinion, and finds and concludes, that such action of the Government in this particular case, in the light of all of the evidence here introduced and above discussed, is capricious and is arbitrary, and therefore the Court declines to enter an order granting to the Government leave to take possession of this property as requested by the Government.

Mr. Merrick: May we have an exception, if the Court please?

The Court: Exception allowed.

Mr. Falk: Do I understand, if it please the Court, that the Court's decision is based upon the evidence as presented?

The Court: That is right.

Mr. Falk: And your Honor's interpretation thereon?

The Court: That is right.

Mr. Falk: I may be in error upon this but as I recall the testimony of Col. Watson was in regard to the pipes and so forth which were the portions only which came within his jurisdiction.

It was my understanding from Major Meyers' testimony that Col. Watson's branch was only to occupy a small portion of the building. I would like to ask leave to recall Major Meyers to the

stand to testify with reference to the specific purposes to which this building was to be put.

It is my understanding that it is not pipe or material of any other kind or character that could be stored [9] in the open. At this time the Government asks leave to reopen and recall Major Meyers to the stand to make a further showing as to the use to which this property will be put.

The Court: Of course, Counsel on both sides are aware that if this request be granted the Court should grant to Counsel on the other side additional time to present more evidence should they desire it.

Do you wish to bring on such consequences?

Mr. Falk: Yes, your Honor, if there was any testimony that they could produce in rebuttal. It seems to me that the showing has been made that they need the space for one purpose.

The Court: It seems to be only fair that a corresponding right be given to the parties to produce rebuttal testimony if they so desire.

Mr. Falk: I think so, your Honor. I believe they have witnesses who were here this morning. This is the date to which the hearing was continued. It is the same date. There is no prejudice whether this testimony had gone in before your Honor's ruling or after your Honor's ruling. It is a question of fact and either my understanding or the inferences that your Honor has drawn from the testimony, there appears to be a divergence between the two. I recall Col. Watson's testimony. I think he testified in portion as your Honor has

suggested. But as to the use of only a small portion of the building.

I would like to have Major Meyers testify as to what portion of the building would be used for Col. Watson's branch and what portion would be used for other branches.

There is also the question of the use of this Lander Street. It seems to me that is entirely beyond the point. [10]

I would also like to call Mr. Mullane to the stand to testify with reference to that use.

It seems to me that we have a war situation here. This is an emergency.

The Court: Why, of course, if you gentlemen on both sides want to further try the case Monday afternoon, after I get through with another matter, the Court might further consider such desire. If both sides want to continue the trial I will hear testimony as long as you think there is material testimony available. I understood that both sides had submitted the case and were willing to abide by the Court's decision upon such evidence as has been introduced up to this time. That was my understanding. You shouldn't submit the case until all of the evidence is in, Mr. Falk. Of course, the Court wishes in a matter of this sort to have all of the evidence.

But I wonder if the other side might not wish to be consulted on the question of whether they have any objections or not.

Mr. Griffin: In behalf of my Respondent I object to reopening the case, and I do it with this

reason: I appreciate your Honor has full discretion in that regard. But the Government introduced its evidence and rested. If you will recall, in rebuttal I made no objection of any kind to the evidence that the Government was introducing, although sitting here as a lawyer I didn't consider it was rebuttal at all. It was part of their case in chief. But I figured your Honor was entitled to hear whatever the officers had to offer. The case having been tried that way, and now simply because the decision—after everybody had rested and full argument made—I didn't even argue the matter because when the matter is tried to the Court which has experience in these matters I don't argue it unless the Court wants it. [11]

I think the case was fully tried and completed. If it is to be reopened it means a retrial. Because your Honor having stated your views, in your opinion, I will feel impelled to obtain additional testimony to sustain the position that your Honor has taken in this matter. I cannot see any advantage, so far as substantial justice is concerned, in retrying the case which has now been tried for parts of three days. I object to reopening it.

Mr. Stedman: I adhere to what Mr. Griffin has said. Furthermore, the Government has only offered to give additional evidence on subjects that have already been gone into. And when Major Meyers was on the stand he testified on the subject that Mr. Falk wishes to requestion him about. My recollection is that he went into that subject in

considerable detail, and there is no necessity for having additional statements along the same lines by the same witnesses that have been before the Court.

The Court: I believe Mr. Merrick wanted to say something else.

Mr. Merrick: I thought your Honor was making a mistake and I was interrupting.

The Court: I daresay that most everyone who doesn't prevail in a situation may have a similar feeling at the moment.

Mr. Merrick: This should properly come up on the motion for new trial but as long as I have the floor and am talking informally,—your Honor made quite a point of the fact that this building was being taken and used for another purpose than that for which it was constructed.

The language contained in the letter by the Secretary of War is the language used in all of these cases, "Used for military supplies and for other military purposes, [12] and the utmost haste in the expediting of this." That is all there is to this case. All of this testimony is immaterial. But that is not your Honor's opinion.

But we take it for military purposes, a specific thing in mind, with the right,—and that right is granted by this Court in all the other cases—to use for any and all military purposes. Because you can't run a war from a courtroom, as your Honor knows.

The question raised by Mr. Falk,—Major Meyers did testify that this was to be used for storage

of ships parts and repairs, from everything from steel plates to the most delicate instruments. Those were his words and they are undisputed at all.

The Court: I do not wish to open up the argument again at this time, Mr. Merrick.

Mr. Merrick: I wanted to cover those two things.

The Court: I understand that your comment is the same kind that you made in your argument. Is there anything further that anybody wishes to say in connection with this taking of further testimony? I understood that was the question now before the Court.

Mr. Merrick: Well, we can furnish plenty of additional evidence as to the details of this storage and to show that a lot of it is incapable of being left out in the weather.

The Court: If I thought that enlargement of the scope of the evidence on that detail that you, Mr. Falk and Mr. Merrick, just then mentioned, would change the decision of the Court,—in other words, if I thought that your showing that the government wanted to store some sugar there would change the decision, I would be more inclined towards opening up the case for the purpose of introducing that additional testimony. [13]

But I am going to say to you frankly what I consider to be the most weighty evidence in the case, which overbalances the weight of the evidence on the Petitioner's side of the case, and in favor of the Respondent's position in this case, and that is that in two instances the Government has ac-

quired already in this neighborhood, and in one instance very near this property, at least two separate warehouse properties, and afterwards it converted them away from warehouse and storage use to office use. I get the impression from the evidence in this case, that the Government has been rather strong on acquiring property and using it for office use. That is the impression,—one impression that the evidence gives the Court in this case. I believe, gentlemen, that that is the evidence that is the most weighty of all in this case in influencing the Court's decision as announced.

So in view of the statements that have been made by Counsel seeking the opportunity of introducing further evidence as well as of Counsel opposed to that, and in view of the observations made by the Court, that request is denied.

I think what is needed here is an expression by an appellate court binding upon this Court as to whether or not this Court has any discretion to search into the issue of arbitrary and capricious action on the part of the Government in a case like this. I believe that the record now will squarely present that issue before any appellate court that might review it.

Mr. Merrick: I think perhaps this will be the first appeal under that possession statute of the Second War Powers Act, which might help everybody.

The Court: I believe so.

Mr. Falk: May we have an exception to the

Court's refusal to grant to the Government possession as of August 31st? [14]

The Court: The exception is allowed.

Mr. Falk: May I also have an exception to your Honor's refusal at this time to permit us to reopen the case to introduce further testimony which in my opinion would correct misconceptions your Honor has drawn from the evidence because I believe that the office space——

The Court: You have already made your argument. You are now only noting an exception?

Mr. Falk: ——was converted to office space rather than——

Mr. Merrick: I wish to file a proposed order.

The Court: Let that proposal be filed. Is it desired by those connected with the case that the matter be continued to a certain time to settle the form of order to be entered in this case?

Mr. Falk: Yes, your Honor, I feel that perhaps Monday should be fixed as the time for setting the order. Would your Honor's oral finding be sufficient for that purpose?

The Court: I should think that Counsel on both sides might wish to consider it further. I will say that I will continue the case until Monday afternoon at 3:00 o'clock for the purpose of settling the order or orders or other papers in the case.

Mr. Griffin: Will your Honor excuse me from appearing at that time? I have already made *plan* reservations for San Francisco and I figured this would be closed,—on another Government matter.

The Court: How long will you be gone, Mr. Griffin?

Mr. Griffin: I can't tell. I am going on another government project. I am only asking that I be excused because Mr. Robinson and Mr. Stedman can handle everything in my absence. [15]

The Court: I was thinking that the Court might need the benefit of your advice concerning your client's position as affected by the form of the order or papers to be entered. It is possible that there might be some diversity of views upon the form of any papers that might be proposed and I wonder if final action upon the matter might be facilitated by your presence.

Mr. Griffin: I hope to be back Wednesday by some time. I can get reservations down,—it is just down into southern Oregon. But coming back, travel is problematical and that is why I am indefinite about it. It will only take me a day down there. It is just the matter of getting back.

The Court: You expect to be there Tuesday?

Mr. Griffin: I expect to be there Tuesday and I hope to be back following that from Portland.

The Court: I think it would be better to have all Counsel present because it seems to be a case which both sides regard as important.

Don't you think it would be better if all Counsel in the case were present?

Mr. Stedman: I believe it would.

The Court: Those that have taken an active part in it, anyway. I think it would not be unreasonable to set it down Thursday morning, then, at a fairly

early hour, with the object mentioned of settling any orders or papers that may be desired by Counsel to conclude the case so that it may be put in final shape and accomplish this Court's completion of its work. So the matter is for that purpose continued to Thursday morning, August 12th, at 9:30.

(Concluded)

[Endorsed]: Filed Aug. 11, 1943. [16]

[Title of District Court and Cause.]

COURT'S OPINION RE: PLEA TO
JURISDICTION

The Court: The Court on August 11, 1943 originally filed its opinion in this case upon substantially the same questions here raised on this plea to jurisdiction. This Court at this time, after further considering this matter and after considering the forceful arguments of Counsel on both sides, is still of the same opinion and adheres to the same views which were expressed in that opinion filed August 11, 1943.

It might now be appropriately added that this Court is of the opinion that in time of war the civil power of the Government is supreme over the war powers of the Government.

I also cite the decision of the Circuit Court of Appeals for the Eighth Circuit in *Carmack vs. United States*, 135 Fed. (2d) 196, wherein the Court at page 200, paragraph [2-4], held that:

"While the Government as a sovereignty has inherent power to take private property essen-

tial to the public welfare, it exercises that power ordinarily pursuant to specific legislation. The right to determine what is a public use and when there is a public necessity for taking specific property is, in the first instance, a legislative rather than a judicial question, but whether in carrying out the purpose of Congress, the officer has acted capriciously or arbitrarily is a judicial question. (Citing). Necessity must be combined with a public use and a necessity for the public structure does not, in the circumstances here presented, imply a necessity for taking this particular property already devoted to a public purpose. That necessity was determined by the Acting Administrator of Federal Works Agency, and whether in determining the issue he acted arbitrarily or capriciously, should be decided by the trial court."

This Court believes that the opinion of the Eighth Circuit Court of Appeals in that case applies to the situation in the case before the Court here, where the Government's position in effect is that, as to administrative acts of Government War Department officials under the Second War Powers Act, there is no judicial review except a review which must result in judicial approval, never disapproval, of administrative action. That I believe is not the law. If it were, a citizen would have no relief in any case against arbitrary or oppressive action of administrative officials.

Upon the evidence adduced at the previous hearing, this Court was of the opinion that this warehouse property was in part used for the public

service. I think there was some evidence that about 10% of the warehouse space was reserved for the accommodation and service of the military forces, or public agencies. I am not going to discuss the details of all the evidence which was before the Court at the previous hearing on the merits on the Government's petition for immediate possession. I think it is proper to comment that in the previous proceedings the Government voluntarily appeared and filed its petition for, among other relief, immediate possession of this warehouse property. The Government in that proceeding neither in writing nor orally gave the Court any information as to when or how measures for the payment, or determination of just compensation, for such taking would be taken. I believe the Constitution makes it plain that there goes with the right which the Government has to condemn private property for public use a duty to justly compensate the owner for it. Up to this time there has not been anything said or done nor has any step been taken by the Government for determining just compensation in this case.

In view of what the Court said in the opinion filed on August 11 and these further observations, the Court does now express the opinion that it does have jurisdiction over this phase of the matter and does now overrule the plea to the jurisdiction and does overrule the objections stated in that plea by the Government to the jurisdiction of the Court.

Mr. Littell: Exception, your Honor?

The Court: Exception allowed.

[Endorsed]: Filed Sept. 21, 1943.

[Title of District Court and Cause.]

COURT'S OPINION RE CONTEMPT
PROCEEDINGS

Be It Remembered, that heretofore and on, to-wit, the 20th day of September, 1943, at the hour of 2:30 p.m., the above entitled matter came on for hearing in the above entitled court, in Department No. 1 thereof, the Honorable John C. Bowen presiding.

Appearances:

Norman M. Littel, Assistant Attorney General; F. P. Keenan and Ernest Falk, Special Assistant Attorneys General, appearing for Petitioner.

Geo. Rummens, Tracy Griffen and Roy D. Robinson, Attorneys, appearing for Respondent Merchants Transfer & Storage Company.

Lewis L. Stedman, Attorney, appearing for Respondent Skinner & Eddy Corporation.

The Court: Are you gentlemen ready to submit this matter insofar as the questions involved up to now go?

Mr. Griffen: We are, sir.

The Court: I would like it to be understood that what the Court has said heretofore and says hereafter is with reference primarily to the Merchants Transfer & Storage Company, which was the tenant in possession of the property under a lease from the owner of the property at the time this proceeding was instituted by the Government. That party is the

one most vitally and immediately concerned other than the Government in this case.

As to the Secretary of War, the Under-Secretary of War, Major Tidemon, Jr., and Mr. Green, the order of August 13 did not command them either to do or not to do anything. They have not yet personally violated any order of the Court.

The order of the Court touching this matter reads as follows, quoting from the order of August 13:

“It is hereby ordered, adjudged and decreed that the motion for the entry of an order granting the Petitioner the right to immediate possession of the said premises be and the same is hereby denied.”

There is nothing in that language that orders any one of these natural persons to do or not to do any act. In the Court's opinion, therefore, they have not done anything forbidden by the Court and they cannot, having done whatever they may have done with respect to the possession of this property outside of the presence of the Court, in my opinion be now in contempt of this Court's process or order.

As to whether or not it is ever proper to enjoin a member of the Armed forces, any officer or member of the Army personnel, the Supreme Court, through Chief Justice Hughes, made some pertinent observations in the case of *Sterling v. Constantin*, 287 U.S. at page 403 of the report, in a paragraph or subject denominated by the Court as “fifth.” After discussing the principle which is really involved in the discussions of Counsel whether or not

it is properly now before the Court for application and decision, Chief Justice Hughes said,

“Whether or not the injured party is entitled to an injunction will depend upon equitable principles, upon the nature of the right invaded and the adequacy of the remedy at law.”

(Quoting from page 403 of the *Sterling* case *supra*.)

That case discusses this subject at great length and the language referred to is the most pertinent in my opinion and the Court will not take up further time in discussing it. The facts in that case were not on all fours with the facts here because there State officers rather than Federal were involved.

There is another case where this question is pointedly discussed as to whether or not an Army officer should be enjoined and that discussion will be found in the case of *Sheriff v. Turner* in 119 Fed. 782, a decision of the Circuit Court, Southern District of Iowa, decided in 1902 and the question involved there was whether or not a property owner whose property was about to be damaged by certain construction features in an Army camp that was being built and where the Army officer in charge of construction was responsible for the method of this particular phase of the construction, could have the Army officer enjoined from proceeding to the property owner's detriment and damage. That Federal Court held that such injunction should not issue and quoted an old case decided by Justice Bradley for

the Supreme Court of the United States, case of *James v. Campbell*, 104 U.S. 356, and the Iowa Federal Court quotes from Justice Bradley's opinion there as follows:

"The course adopted in the present case of instituting an action against a public officer, a public officer who acts for and in behalf of the Government, is open to serious objections. We doubt very much whether such an action can be sustained. It is substantially a suit against the United States itself, which cannot be maintained under the guise of a suit against its officers and agents except in a manner provided by law. We have heretofore expressed our views on this subject in *Carr v. United States*, 98 U.S. 433, where a judgment in ejectment against a Government agent was held to be no estoppel against the Government itself."

Judge McPherson, speaking for the Iowa Circuit Court in 1902 in that case of *Sheriff v. Turner*, declined to enjoin the Army officer in charge of the construction of the camp from doing the alleged unlawful acts and particularly those acts alleged by the property owner to be without right, harmful and injurious to the private owner's property.

I think there is not any question in time of war about this when applied to Army officers. An Army officer has no discretion ordinarily in complying with the orders of his superiors. If the Court had before it the official, who, after the various consultations that doubtless were had in this case, came to the conclusion that the Government should take

immediate possession of it, the Court might have had a different viewpoint with respect to individuals. There is no showing of that. All there is here is a showing that certain individuals acting for the Army took possession of this warehouse property. If the Court had before it the person or official directing and responsible for the decision which directed the taking of possession, the Court might make some orders or entertain a request for some orders directing that person's future conduct with reference to it. The Court thinks in time of war that Army officers and those acting with them and only in official cooperation with them, should not be enjoined by this Court from carrying out the commands of their superiors.

A further reason I think so is that there is in my opinion in this case an adequate remedy at law against the United States. The United States, in the Court's opinion, has taken possession of this property without right. It has done so unlawfully, and I think that the United States should be made, in a proper proceeding, to respond in damages as for a contempt for failure to comply with the Court's order, if and when made, for the Government to return possession to those entitled to it. If the Court is wrong in that, it can be developed in a proceeding to ascertain the extent of such damages, for failure of the United States to return such possession. This procedure would result in at least establishing the moral obligation of the United States to protect the owner and save the owner harmless in respect to any damages which

may result as a result of the Government's failure to return possession.

In this decision by Judge McPherson you will find forceful statements by the Court, where it was observed that even though there might not be in some instances a speedy and in all respects adequate remedy in the hands of the property owner, there still would be raised a moral obligation on the part of the Government and those acting for it to do all possible, not only in dealing directly with the owner's property but in the future, to save the property owner harmless and likewise it could be expected that Congress, if there was any doubt about the authority of the United States to do the right thing by the property owner under present law, in the future would take such steps as would save the property owner harmless. So that irrespective of the question of valid service of the show cause order and even if you had all four of these natural persons before the Court here today, I don't think in this war time that there is any occasion for this Court issuing a mandatory injunction requiring these individuals, who have no discretion in this matter, to do or not to do anything, even if the Court had already entered an order calling upon them to do it. That is over and above the Court's statement at the outset that these natural persons have not violated any order of this Court. They have not done so. The taking of possession of this property, though, the Court repeats, by the United States, after this Court de-

nied its motion for leave to take possession, is contrary to the right of the property owner and it seems to me that if that is persisted in, will be the kind of an act which if done by a private person would justify the Court in adjudging contempt. I do not know whether the United States will continue in possession or not. If the Court orders the United States to return possession forthwith, it might be that the United States would prefer to do that and then institute the normal kind of condemnation proceedings by declaration of taking and depositing in court of just compensation. I do not know what it might wish to do. That is for the United States to decide, but upon a proper application, or upon proper motion therefor, this Court suggests that it will enter an order directing the United States to forthwith return this property to those who were in possession of it when the United States unlawfully took it.

Mt. Littell: May I ask a question, your Honor? Does your Honor make that statement now without reference to the fact that we are prepared to show in proof why this property is necessary in so far as the facts can be revealed without affecting the public's security adversely? We are prepared to go forward to the extent necessary and I don't quite understand your Honor's ruling, when the Government is already in possession. Is it a notice to the Government that we should get out of possession?

The Court: For the more particular information of Counsel on both sides, I will say that if

this matter were put in proper condition upon this record, the Court would order the United States to give up the possession.

Mr. Littell: On the basis of the facts already introduced in evidence?

The Court: Yes, that is right.

Mr. Griffen: If the Court please, following your Honor's suggestion, the order to show cause in furtherance of the ruling issued by your Honor on September 17 makes that very request.

The Court: I desired to have your response and your statement clarifies your position. I will hear anyone else's comment on that question.

Mr. Falk: May it please the Court, may we ask that Mr. Griffen's statement be read by the reporter?

The Court: The reporter will read Mr. Griffen's statement.

(Reporter reads previous statement by Mr. Griffen.)

Mr. Keenan: I might point out to your Honor that immediate possession was not taken. Almost 30 days intervened and that isn't immediate. Many things might have intervened in that time, military necessity here or something up in Kiska. I am sure no one came into this Court just before the Army took possession and notified the Court of the Army's need for this particular property. I think when the Court says "immediate," denies "immediate," he didn't deny possession at any time, and any time we would need it, again it is

a question of them needing it, we could come in 30 days after or 40 or 50, but if the situation changes so that 30 days having elapsed from the time the motion by the Government for immediate possession was not granted, the picture changes completely.

The Court: We will have a five-minute recess, after which we will proceed with this hearing.

(Short recess.)

Mr. Littell: If your Honor please, I am not wholly certain that I understand the full import of your Honor's decision at the conclusion just before intermission but if I do understand it and your Honor has said that the continuing of possession in the face of your order would be such an act as on the part of a private individual might be subject to contempt and that your Honor might find it necessary to take action impliedly by contempt should the Government continue in possession. I gather that I have stated your Honor's position.

The Court: I think that is a fair construction of it.

Mr. Littell: Then, your Honor, I must point out that that raises quite clearly the issue which I was unable to persuade your Honor of, that we have the war power of the Government in operation, maintaining a supply line to the Far East and Alaska, with which your Honor's decision, as I have now stated it, would most definitely and certainly interfere, or it would compel us—I mean the Government, the Army—to take other storage

space and create another situation. The fact of the matter is that the war power is being exercised by direction of the Secretary of War, that these officers are obeying the command of the Secretary of War, they are in possession of this property and I must state to the Court that they will continue in possession of the property. Then if the Court finds it appropriate in the exercise of its powers to either punish in contempt or seek to enjoin the United States from continuing in possession of this property, it will be necessary for us to seek a remedy for that decision on appeal, but I cannot stop, even if I wished,—I could not stop the war power of the Government in the exercise of this vital function of maintaining the supply line and of operating in this storage as it is bound to operate. In deference to the property owner, and for his convenience, he has not actually physically been removed; he has been prevented from putting more storage in and allowed to liquidate the storage he has there. That cannot go on indefinitely, in view of the mission of this area, of which I am aware.

The Court: Then I understand from what you say it may as well be understood so far as the record goes now the Government declines to give up possession which it has taken without the order of the Court and leaves the Court to make such order as it thinks it should make upon the record already before the Court?

Mr. Littell: That is the position of the Government.

The Court: The Court advises the parties and Counsel that it is of the opinion that upon this return to order to show cause the Court should enter an order requiring the Government to forthwith return this property to those in possession of it when the Government took it.

Mr. Littell: Exception.

The Court: And that for failure to do so the Government will be assessed as for contempt damages, to be ascertained by further hearings thereon. At such hearings consideration might be given to such damages as those entitled to possession will suffer from day to day during the time that the Government wrongfully withholds that possession.

I want to say in making this order that it is without prejudice to any right the Government may have to file either in this proceeding or in a new proceeding a declaration of taking with a deposit for just compensation.

Mr. Littell: May I comment, your Honor? I was unable to follow your Honor's comments now confirmed again by your comment as to the declaration of taking, in respect to the failure to provide for just compensation. That seems to make a great difference to the Court. Actually it makes no difference. The appropriation has been made for this property. The full faith and credit of the United States Government is pledged to pay the property owner for the property, just compensation as required by the Constitution. He is not without his remedies in full; the declaration of taking does not change that situation at all, it merely changes the

remedy whereby the Government acquires property and the amount of deposit in Court is to all intents and purposes, as far as the law is concerned, accomplished by the presence of appropriated funds already available for payment to this property owner. He is not without his remedy. He gets reimbursement in full for what has been taken from him.

Mr. Griffen: Would your Honor fix a time, say two o'clock tomorrow afternoon for presentation—

The Court: No, I cannot do it tomorrow.

Mr. Griffen: Will your Honor fix a time for presentation of the order?

The Court: Of this order?

Mr. Griffen: Yes, your Honor.

The Court: Yes.

Mr. Keenan: If the Court please, I am a little bit perplexed, I am completely out of my depth now. When is it contemplated that the Court is going to fix this day to day damage?

The Court: At such time as may be convenient to the parties and their Counsel.

Mr. Keenan: Well, is this a part of the trial on condemnation to award just compensation or is this a proceeding in the middle, or what are we dealing with?

The Court: I prefer you to place your own construction on it. I was not thinking of the necessity of giving it a name. I was merely indicating what I thought would be the proper procedure hereafter and I think the Court might particularize

by repeating what was said, that for failure of the Government to comply with the order to forthwith return the possession of the property, it will be liable to be assessed with damages as for contempt, to be determined hereafter.

Mr. Keenan: I am not sure that the record shows that we have an exception. May the record show that the Government has, your Honor?

The Court: Exception allowed.

Mr. Keenan: And the reason I asked the question was simply so when we come up here we will know whether we are coming up here on this sort of intermediate question or whether we have got to be prepared to prove value at that time.

The Court: All the Court meant, Mr. Keenan, or intended to mean, was proceedings to assess penalties and damages in favor of those entitled to damages as a legal remedy in lieu of injunctive relief, as for contempt.

Mr. Keenan: The reason I ask, of course, is that the United States Government would not produce any evidence on that, would stand on its rights.

Mr. Littell: Does the contempt proceedings contemplate individual contempt proceedings against the officers?

The Court: No. I said that for failure of the Government to return possession to those entitled to the possession of this property ordered by the Court, the Government would be liable to be assessed damages for the wrongful detention of the property, such damages to be hereafter determined,

and that that proceeding would be in the nature of a contempt proceeding against the Government of the United States.

Is there anything else?

Tomorrow afternoon, if that is agreeable to Counsel, it will be agreeable to the Court to settle this form of order.

Mr. Littell: I would much prefer it. I am leaving the next day, your Honor. If it could be possible, I would appreciate Counsel's—

Mr. Griffen: Two o'clock.

Mr. Littell: At two o'clock?

Mr. Griffen: Yes.

Mr. Littell: If that is agreeable to the Court.

The Court: That is agreeable. Any other matters to come before the Court at this time? The Court will now be adjourned until tomorrow at ten o'clock.

(Adjournment at 5:26 p.m. September 20, 1943.)

[Endorsed]: Filed Sept. 21, 1943.

[Title of District Court and Cause.]

DATE OF PROCEEDINGS:

OCTOBER 4, 1943

The Court: Do Counsel present have a recollection different from that of the trial judge in respect to the accuracy or substantial accuracy of this statement appearing on page 2, beginning at

line 28, of this re-write of the Court's Opinion re Plea to Jurisdiction:

"I think there was some evidence that about 10% of the warehouse space was reserved for the accommodation and service of the military forces, or public agencies."

Do any Counsel in the case disagree with the Court's recollection that that statement is justified by the evidence that was heard in open court?

Mr. Falk: I do not disagree with it, Your Honor, but I believe it is correct.

The Court: Does anyone else disagree with it?

Mr. Griffen: No, your Honor.

Mr. Falk: May I make one comment with reference to this, your Honor?

The Court: Yes.

Mr. Falk: On page 3 I notice your Honor's statement, I hadn't appreciated it when it was read before,

"The Government in that proceeding neither in writing nor orally gave the Court any information as to when or how measures for the payment, or determination of just compensation, for such taking would be taken."

I believe the petition itself requests that the amount of just compensation be determined and that the persons entitled to it be determined.

The Court: But that was for something later. That wasn't in connection with the motion for immediate possession.

Mr. Falk: Well, that is true, your Honor.

The Court: That is what I had in mind.

Mr. Falk: And I would feel it is my duty to advise the Court of this further factor; I did not personally prepare the petition in condemnation but the last statute cited therein is an act approved July 1, 1943, Public Law 108, 78th Congress. I am inclined to believe that that is an appropriation act. I would be glad to check it and to advise the Court.

The Court: The point about it is this, that there are usually two phases to these proceedings. Where this immediate possession proceeding is had, it may be under a petition which Counsel filing it may have thought would be sufficient later on for some declaration of taking proceeding. I do not know what their attitude was, but usually in the possessory proceeding that part of it has been regarded as distinct from the declaration of taking proceeding. The possessory action, although apparently in counsel's mind coming in under the petition they hope covers both proceedings, does not take any steps to determine nor to have anything to do with just compensation.

Mr. Falk: Well, I thought that it was my duty, your Honor, to call to the Court's attention my belief that this statute is an appropriation act and——

The Court: That is agreeable.

Mr. Falk (Continuing): ——the portion of the prayer wherein we ask that the compensation be paid.

The Court: Your doing so is agreeable to the Court but I feel that the Court's statement, with the explanation made by the Court, is correct.

The further point about it is that one could file such petition with that prayer that you speak of in it, which might apply to the declaration of taking proceeding if and whenever that is taken, and the Government, after getting possession under one of these motions for immediate possession proceedings under the petition you speak of with the general prayer, might be quite content with the possession for a long time without taking any steps at all for determining just compensation. I think there have been one or two instances in this court of quite a period of time passing between the hearing on the motion for immediate possession and the hearing on the declaration of taking (which declaration of taking hearing usually occurs at the same time as the filing of the declaration of taking).

Mr. Falk: Your Honor's statement is entirely correct in that regard, but, as I understand the declaration of taking, it is primarily for the purpose of stopping interest running against the Government and the property owners have a right at any time to ask the cause be tried to determine just compensation.

The Court: I don't see how the parties could act if all there was before the Court was the motion for leave to take immediate possession, and where under this petition that you speak of with this general prayer for determining just compensation there

wasn't any step taken by the Government by which such determination could be made, such as depositing the estimated just compensation together with the declaration of taking.

Then let this Court's Opinion re Plea to Jurisdiction be filed in this case as of September 21, 1943, and I think it should take priority in time over the other Opinion that was filed on that date, which is denominated "Court's Opinion re Contempt Proceedings," and it is so ordered,—that in point of time it be regarded as being filed prior to such last mentioned opinion.

[Endorsed]: Filed Oct. 5, 1943.

[Title of District Court and Cause.]

CERTIFICATE OF JUDGE

I, John C. Bowen, one of the Judges in the United States District Court for the Western District of Washington, Northern Division, do hereby approve the foregoing Narrative Statement of Testimony Taken at Hearings on August 4, 1943 and August 5, 1943 and do hereby certify that the said Narrative Statement of Testimony, together with the Transcript of Testimony of the hearing on August 7, 1943, reported and transcribed by Merritt G. Dyer, Court Reporter, and certified to by him, containing 69 pages including the certificate, constitutes all the material testimony and proceedings given and had during the hearings on August 2, 4, 5, and 7 in con-

nection with the application of petitioner, United States of America, for entry of an order of immediate possession, and do further certify that the said Narrative Statement and Transcript of Testimony are full, true and accurate and that the witnesses sworn at said proceedings did, in fact, testify as set forth in said Narrative Statement and said Transcript of Testimony, and that the foregoing four opinions and decisions of the Court constitute all of the opinions and decisions of this Court on the merits of the matter in controversy.

Done in open court at Seattle, Wash., Oct. 5, 1943.

JOHN C. BOWEN,

United States District Judge.

We hereby approve the form and substance of the foregoing certificate before the entry of the same.

ERNEST FALK,

of Counsel for Petitioner,

LEWIS L. STEDMAN,

RUMMENS AND GRIFFIN,

of Counsel for Respondents.

[Endorsed]: Filed Oct. 5, 1943.

[Endorsed]: No. 10573. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Merchants Transfer & Storage Company, a corporation, Skinner & Eddy Corporation, a corporation, Lewis L. Stedman, Liquidating Trustee of Skinner and Eddy Shipbuilding Company, a dissolved corporation, and King County, Washington, a municipal corporation, Appellees, and Merchants Transfer & Storage Company, a corporation, Skinner & Eddy Corporation, a corporation, and Lewis L. Stedman, Liquidating Trustee of Skinner and Eddy Shipbuilding Company, a dissolved corporation, Appellants, vs. United States of America and King County, Washington, a municipal corporation, Appellees. Transcript of Record. Upon Appeals from the District Court of the United States for the Western District of Washington, Northern Division.

Filed: November 15, 1943,

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals for
the Ninth Circuit

No. 10573

UNITED STATES OF AMERICA,

Petitioner,

v.

43,355 SQUARE FEET OF LAND, MORE OR
LESS, SITUATE IN KING COUNTY,
STATE OF WASHINGTON;

MERCHANTS TRANSFER & STORAGE COM-
PANY, a corporation;

SKINNER & EDDY CORPORATION, a corpora-
tion;

LEWIS L. STEDMAN, Liquidating Trustee of
Skinner and Eddy Shipbuilding Company, a
dissolved corporation;

KING COUNTY, WASHINGTON, a municipal
corporation, et al.,

Respondents.

CONCISE STATEMENT OF POINTS UPON
WHICH APPELLANT INTENDS TO RELY
ON APPEAL

The appellant, The United States of America,
makes the following concise statement of points on
which it intends to rely on appeal:

1. The trial court erred in overruling United
States of America's Plea to Jurisdiction.

2. The trial court erred in not holding that the United States of America was rightfully in possession of the premises involved.

3. The trial court erred in holding that the United States of America had taken possession of the condemned property unlawfully and without right, and contrary to the trial court's order of August 13, 1943.

4. The trial court erred in holding that there was an order that could have been violated by the United States of America.

5. The trial court erred in issuing a mandatory injunction against the sovereign, United States of America.

6. The trial court erred in decreeing that in the event said mandatory injunction was not obeyed, the sovereign, United States of America, would be assessed damages for contempt of court.

NORMAN M. LITTELL,

Assistant Attorney General,

VERNON L. WILKINSON,

F. P. KEENAN,

ERNEST FALK,

Attorneys for Plaintiff-Appellant, United States of America.

[Endorsed]: Filed Nov. 15, 1943.

